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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1583

ALLSTATE INSURANCE COMPANY,
AN ILLINOIS CORPORATION,
Petitioner,

vs.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioner, Allstate Insurance Company ("Allstate"), prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Michigan entered in this action on June 8, 1978.[1]

1. The respondents to this petition are: Frank J. Kelley, Attorney General of the State of Michigan, Richard H. Austin, Secretary of State of Michigan, Jean Carlson, Acting Commissioner of Insurance of the State of Michigan, Aetna Casualty & Surety Company, Travelers Indemnity Company, Hartford Accident & Indemnity Company, Continental Casualty Company, Home Indemnity Company, League General Insurance Company, State Farm Mutual Automobile Insurance Company, Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company of America, all of whom were defendants below, and Catherine Shavers, James A. Jachim, Eric Gentile, Gregory Hicks, Mel Janasevich, John Shano,

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OPINIONS BELOW

The opinion of the Michigan Supreme Court is officially reported *sub nom. Shavers* v. *Attorney General* at 402 Mich. 554, unofficially reported at 267 N.W.2d 72, and reproduced in official form in Appendix A. The opinion of the Court of Appeals of Michigan is officially reported at 65 Mich. App. 355, unofficially reported at 237 N.W.2d 325, and reproduced in official form in Appendix E. The opinion of the Circuit Court for the County of Wayne, State of Michigan, which is unreported, is reproduced in Appendix F.

JURISDICTION

The final judgment of the Michigan Supreme Court was entered on June 8, 1978. The Michigan Supreme Court denied a timely application for rehearing on December 1, 1978. On February 16, 1979, Mr. Justice Stewart entered an order extending the time for filing this petition for a writ of certiorari to and including April 15, 1979. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Several Michigan residents brought a class action to challenge the constitutionality of numerous provisions of the Michigan No-Fault Insurance Act ("Act"). The case was tried to judgment, reviewed by the Court of Appeals of Michigan, and appealed to the Supreme Court of Michigan without any party ever raising, briefing, or arguing whether private insurers marketing the compulsory no-fault coverages required by the Act must

(Footnote continued from preceding page.)
Raymond Hullum, Cleveland Clavon, Steven Makela, Linda Chamberlin, John Savard, Mary J. Weinbaum, Connie Stuckey, Marie Spearman, Theodore Spearman, Barbara Grosvenor, Robert Grosvenor, and Ina Zeemering, plaintiffs below.

afford procedural due process protection to prospective policyholders. Yet, considering this issue *sua sponte*, the Michigan Supreme Court held that the insurers engage in state action and are therefore bound by the Due Process Clause of the Fourteenth Amendment.

The question presented is whether privately owned insurance companies which provide the no-fault automobile coverages required by Section 3101(1) of the Act engage in state action so as to subject them to the requirements of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Fourteenth Amendment to the United States Constitution, Section 1 of which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Mich. Comp. Laws §§ 500.2400-500.2484 and 500.3101-500.3380, which are set forth in full in Appendix H.[2]

2. The statutory sections contained in Appendix H are in the form considered by the Michigan Supreme Court in reaching its decisions, since those are the statutes involved in this Petition. Four sections, not relevant to the issues raised herein, have since been amended by the Michigan legislature: Mich. Comp. Laws §§ 500.3108, 500.3116, 500.3123, and 500.3131. In addition, § 500.3104, which also has no impact on the issues raised herein, has been added. That section provides for the establishment of a "catastrophic claims association" to spread the risk of disastrous losses among all companies writing automobile insurance in Michigan.

STATEMENT OF THE CASE

The Act,[3] which became law on October 1, 1973, requires owners and registrants of motor vehicles in Michigan to "maintain security for payment of benefits under" certain specified no-fault insurance coverages. Mich. Comp. Laws § 500.3101(1) (App. H, p. A290). On August 28, 1973, a class action was filed against 25 automobile insurers (including Allstate) and various Michigan public officials in the Circuit Court for the County of Wayne, State of Michigan challenging the constitutionality of the Act on a number of grounds and seeking declaratory and injunctive relief preventing its enforcement. On May 20, 1974, the trial court issued a 116-page opinion in which it held, *inter alia*, that the legislature did not exceed its police power in enacting Section 3101(1) of the Act. App. F, pp. A191-A192. Although the court declared certain severable portions of the Act unconstitutional,[4] it did not consider whether Section 3101(1) denied procedural due process, presumably because no party had ever made such a claim in its pleadings or during the 2½ month trial of the case.

Many parties appealed, but none questioned the trial court's determination that Section 3101(1) was constitutional. On November 5, 1975, the Court of Appeals of Michigan affirmed in part and reversed in part.[5]

3. Mich. Comp. Laws §§ 500.3101-500.3179. The introduction to Appendix H summarizes the provisions of the Act, as well as the related provisions found in Mich. Comp. Laws §§ 500.2400-500.2484 and 500.3204-500.3380. The Act together with the related provisions are referred to hereinafter as "the Michigan statutes."

4. The trial court found Sections 3101(2), 3107(b), 3109(1), 3109(3) and 3113 of the Act unconstitutional. App. F, pp. A215-A219, A225-A229, A230-A235, A235-A240, and A241-A242, respectively. It also determined that the Act's personal injury protection scheme was constitutional, but that its property damage protection scheme was unconstitutional. App. F, pp. A192-A215.

5. 65 Mich. App. 355, 237 N.W.2d 325 (App. E). The court of appeals affirmed the trial court's judgment as to the personal

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Plaintiffs obtained leave to appeal to the Michigan Supreme Court. Because the Act "profoundly and importantly affects a crucial dimension of our lives," the supreme court declared that it felt "compelled to address" the procedural due process sufficiency of Section 3101(1) even though the court of appeals had not done so and no party had raised this issue at any point in the proceedings. *Shavers, supra,* 402 Mich. at 590, 593-94 n.14, 267 N.W.2d at 82, 84-85 n.14 (App. A, pp. A13, A16-A18 n.14).[6] Thus, on June 8, 1978, in an opinion written by Justice G. Mennen Williams, the Michigan Supreme Court upheld the Act as a valid exercise of the legislature's police power, but ruled *sua sponte,* by a four-to-three majority, that Section 3101(1) was unconstitutional because it denied procedural due process.

The predicate of the court's decision to impose due process obligations upon Michigan automobile insurers was the majority's determination that the activities of such companies constitute state action.[7] The court's entire discussion of state action consisted of the following:

(Footnote continued from preceding page.)

injury and property damage schemes, and overruled the judgment as to Section 3101(2). 65 Mich. App. at 363-72, 237 N.W.2d at 331-35 (App. E, pp. A159-A167). The primary divergence of opinion between the trial and appellate courts was over the plaintiffs' standing to contest the Act. *See* 65 Mich. App. at 361-63, 237 N.W.2d at 330-31 (App. E, pp. A158-A159).

6. As noted by the Michigan Supreme Court in its footnote 14, several parties discussed the substantive due process issue of the state legislature's police power to enact no-fault insurance statutes in their briefs before that court. However, as all three dissenting Justices pointed out, no one addressed the issue of procedural due process on which the Michigan Supreme Court ultimately ruled. *Shavers, supra,* 402 Mich. at 641-43, 267 N.W.2d at 107-08 (App. A, pp. A62-A64) (Ryan, J.); 402 Mich. at 666-67, 267 N.W.2d at 118-19 (App. A, p. A85) (Fitzgerald, J.); 402 Mich. at 673, 267 N.W.2d at 122 (App. A, p. A91) (Coleman, J.).

7. After the Michigan Supreme Court raised and decided the state action issue, it was properly preserved for review by being argued in the Application for Rehearing filed below by several defendants, including Allstate. App. C, pp. A117-A120.

"The protections of the due process clause can only be invoked when there has been state action. *Jackson* v. *Metropolitan Edison Co,* 419 US 345, 349-350; 95 S Ct 449; 42 L Ed 2d 477 (1974).

"The No-Fault Act compels insurance for all motor vehicles; failure to comply with this requirement may result in criminal and civil sanctions. In addition, the No-Fault Act specifies the extent of coverage to be provided and the conditions of payment for insurance benefits. Finally, the No-Fault Act and the Insurance Code provide for the assignment of claims and risks. In effect, insurance companies are the instruments through which the Legislature carries out a scheme of general welfare. This legislation goes beyond a grant of a monopoly or an attempt to regulate a utility; there exists 'a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the [regulated entity] may fairly be treated as that of the State itself'. *Jackson* v. *Metropolitan Edison Co, supra,* 419 US 345, 351." *Shavers, supra,* 402 Mich. at 597, 267 N.W.2d at 86 (App. A, pp. A20-A21). (Footnotes omitted.)[8]

Having found the requisite state action, the court held that Section 3101(1) violated the Due Process Clause of the Fourteenth Amendment because the Michigan statutes failed to provide sufficient procedural safeguards for insureds regarding the insurers' conduct in setting rates for the no-fault coverages, refusing to write or renew such coverages, and cancelling policies containing such coverages during their term. *Shavers, supra,* 402

8. Although the Michigan Supreme Court cited both the Michigan and the United States Constitutions in its opinion, the state action holding rested solely upon this Court's decision in *Jackson* v. *Metropolitan Edison Co,* 419 U.S. 345 (1974). The court below relied upon neither the Michigan Constitution nor any Michigan case law in its discussion of state action. Thus, the court either decided the issue solely pursuant to the United States Constitution, or, at least, ". . . felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568 (1977). In either event, this court has jurisdiction to decide the federal issue. *Id.*; *State of Missouri* v. *Mayfield,* 340 U.S. 1, 5 (1950).

Mich. at 600-05, 267 N.W.2d at 87-91 (App. A, pp. A23-A28). The court held that Michigan residents have a statutorily protected interest in no-fault insurance at "fair and equitable" rates; that this interest is entitled to due process protection; and that privately owned insurance companies writing no-fault insurance have a constitutional obligation to provide such protection. *Shavers, supra,* 402 Mich. at 600, 267 N.W.2d at 87 (App. A, p. A23).

On the assumption that "the Legislature and the Commissioner of Insurance will seek to remedy the constitutional deficiencies articulated" in the opinion, the court provided that its declaration that Section 3101(1) is unconstitutional would not become effective until 18 months after the issuance of its opinion.[9] *Shavers, supra,* 402 Mich. at 608-09, 267 N.W.2d at 91-92 (App. A, p. A31). Thus, if the alleged deficiencies are not remedied within this period, the court's decree will automatically become effective on December 8, 1979.[10]

9. Until the legislature or Commissioner of Insurance provides the due process safeguards required by the Michigan Supreme Court, the Commissioner is directed by the court to:

". . . actively enforce the present regulatory scheme in the spirit of our opinion in order to assure the availability of no-fault insurance at fair and equitable rates during this period." *Shavers, supra,* 402 Mich. at 611, 267 N.W.2d at 92-93 (App. A, p. A33).

To date, more than ten months after the Michigan Supreme Court's mandate, no legislation or administrative rules have been promulgated correcting the supposed due process deficiencies of the Act, although proposed amendments to the Act and agency regulations are under consideration.

10. Despite the eighteen month grace period, the Michigan Supreme Court's decision is "final" within the meaning of 28 U.S.C. § 1257 and therefore reviewable by this Court. Any additional proceedings will concern only amendments to the Act or new regulations promulgated by the Commissioner. The underlying decision that private insurance companies are engaged in state action and must therefore accord insureds procedural due process is now conclusive and will survive any such proceedings. *See Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 480 (1975). Indeed, the finding of state action is the reason for such further proceedings. Thus, this

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REASONS FOR GRANTING THE WRIT

A bare majority of the Michigan Supreme Court, acting *sua sponte*, has rendered the first reported decision by any court holding that private insurers who furnish any form of compulsory insurance, no-fault or otherwise, become an arm of the state by doing so. Their decision conflicts with the holdings of this Court defining those activities of private persons which constitute state action. *See, e.g., Jackson* v. *Metropolitan Edison Co*, 419 U.S. 345 (1974); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). By ignoring this Court's holdings, the Michigan Supreme Court has adopted an expansive concept of state action which threatens to subject insurance companies and other similarly regulated industries, such as utilities, banks and common carriers, throughout the United States to the overwhelming burden of providing formal notice and adversary hearings at every stage of their routine business transactions, with the inevitable result of increasing the cost of the services provided by those businesses. These consequences can be prevented only by this Court's review and reversal of the ruling below.

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Court's present review of the decision below would serve the interests of judicial economy, by obviating further litigation if it is determined that the Michigan Supreme Court has erred. *See Id.* at 477-78 (1975); and *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966).

Nor is the finality of the judgment below impaired by the fact that the Michigan Supreme Court remanded some issues for further resolution. *See* Parts VIII and IX of its opinion, 402 Mich. at 634-38, 267 N.W.2d at 104-06 (App. A, pp. A56-A59). The issues remanded are severable from the question presented here. *Shavers, supra*, 402 Mich. at 638 n.66, 267 N.W.2d at 106 n.66 (App. A, p. A59 n.66). Moreover, they have now been disposed of on remand. *See* the trial court's order of February 13, 1979 entered pursuant to the stipulation of the parties. App. G, p. A256. Therefore, they do not affect the finality of the decision as to the constitutionality of Section 3101(1) of the Act. *See Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963); *Construction Laborers* v. *Curry*, 371 U.S. 542, 548-52 (1963).

I. THE MICHIGAN SUPREME COURT'S HOLDING THAT PRIVATE INSURERS ENGAGE IN STATE ACTION BY MARKETING NO-FAULT INSURANCE CONFLICTS WITH THIS COURT'S RECENT DECISIONS ON STATE ACTION.

It is settled law that the Fourteenth Amendment constrains only state action. *The Civil Rights Cases*, 109 U.S. 3, 11-18 (1883). This restriction serves a critical function in our constitutional scheme:

> "[B]y exempting private action from the reach of the Constitution's prohibitions [the state action limitation] stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices, . . ." Tribe, *American Constitutional Law*, at 1149 (1978).

This Court has repeatedly recognized that the boundaries of the state action limitation must be drawn so as to effectuate this purpose. Thus, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson, supra*, 419 U.S. at 350. *Accord, Moose Lodge, supra*, 407 U.S. at 173, 176-77. When private actions, such as the commercial decisions of a regulated business, are challenged under the Due Process Clause, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson, supra*, 419 U.S. at 351. Although the Michigan Supreme Court correctly stated the *Jackson* rule (*Shavers, supra*, 402 Mich. at 597, 267 N.W.2d at 86 (App. A, p. A21)), it incorrectly applied it in concluding that the conduct of private automobile insurance companies marketing no-fault insurance in Michigan involves state action.

This Court has articulated three tests for determining which activities of non-governmental entities constitute state action: (1) whether there is sufficient state involvement in the chal-

lenged conduct to establish a factual nexus between the private party and the state (*see, e.g., Jackson, supra,* 419 U.S. at 351-52); (2) whether the private conduct at issue involves the performance of a public function (*see, e.g., Flagg Bros., supra,* 436 U.S. at 157-58); and (3) whether the challenged private conduct is governmentally compelled or receives a sufficiently high level of official encouragement (*see, e.g., Moose Lodge, supra,* 407 U.S. at 176-78). The conduct of automobile no-fault insurers under the Act meets none of these tests.

A. The Nexus Between the State of Michigan and the Activities of Private No-Fault Insurers Is Not Sufficiently Close to Treat the Insurers' Actions as Those of the State.

The holding below conflicts most sharply with *Jackson,* the principal decision of this Court examining the nexus between a regulated business and the state and the only precedent cited by the Michigan Supreme Court. In *Jackson* the plaintiff's electric power service was terminated for alleged non-payment. She sued Metropolitan Edison under 42 U.S.C. § 1983 charging that termination without notice or hearing denied her due process. This Court affirmed the dismissal of the petitioner's complaint, holding that:

> ". . . the State of Pennsylvania [was] not sufficiently connected with [Edison's] action in terminating petitioner's service so as to make [Edison's] conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." 419 U.S. at 358-59.

Metropolitan Edison, unlike privately owned no-fault insurers, was defined by statute as a public utility. *See* Pa. Stat. Ann. tit. 66, § 1102(17). For purposes of its decision in *Jackson,* this Court assumed that Edison enjoyed a local monopoly protected by state law (419 U.S. at 351-52), whereas over 280 automobile insurers compete with one another in Michigan.[11] Edison was at least as heavily regulated as are

11. *See* the January 22, 1974 trial testimony of Robert Rowe, then Chief Deputy Insurance Commissioner of the State of Michigan (Tr. 773-74).

the Michigan automobile insurers. Its rates were set by approval of a general tariff filed with the Pennsylvania Public Utilities Commission, just as Allstate's premium rates are set by approval of a schedule filed with the Michigan Commissioner of Insurance.[12] Moreover, Edison's procedures for terminating its electrical service to customers were embodied in the general tariff approved by the Pennsylvania Commission, just as Allstate's procedures and practices for cancelling or refusing to renew its insureds' policies are embodied in policy forms approved by the Michigan Commissioner.[13]

In short, neither the Michigan Supreme Court's conclusion that Section 3101(1) makes no-fault insurance compulsory for every owner or registrant of a motor vehicle in the State[14] (402 Mich. at 593-94, 267 N.W.2d at 84-85 (App. A, pp. A16-

12. Edison's ratemaking procedure was governed by the Pennsylvania Public Utilities Code. Pa. Stat. Ann., tit. 66, §§ 1141-1153. Michigan automobile insurance ratemaking is governed by Mich. Comp. Laws §§ 500.2406, 500.2430 (App. H, pp. A265-A266, A270-A271).

Under the Michigan statutes, automobile insurers set their own rates subject to review and disapproval by the Insurance Commissioner if he finds them contrary to law. Mich. Comp. Laws §§ 500.2406, 500.2430 (App. H, pp. A265-A266, A270-A271). This procedure is substantively identical to the tariff approval procedure which in *Jackson* was held insufficient to convert Edison's private conduct into state action. 419 U.S. at 354-55.

13. Michigan Insurance Department Bulletin AD 74-2 (April 15, 1974) requires all automobile insurers to file their policy forms with the Commissioner of Insurance before putting them into service. Allstate's filed policy forms contain its cancellation and non-renewal procedures, although Michigan law does not require them to be set forth in the policy. Like Edison's tariff in *Jackson,* the forms are deemed approved unless the Commissioner affirmatively disapproves them.

14. This conclusion is inaccurate, since the Act requires only that such an individual "maintain security for payment of benefits under" the no-fault insurance coverages. Section 3101(1) (App. H, p. A290). While purchasing a policy of insurance containing these coverages, as permitted by Section 3101(3) (App. H, p. A291), may be the most common way of satisfying this requirement, the maintenance of "security equivalent to that afforded by a policy of insurance," such as a bond, is expressly authorized by Section

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A17)), nor its observation that ". . . the independent mobility provided by an automobile is a crucial, practical necessity . . ."[15] (402 Mich. at 598, 267 N.W.2d at 87 (App. A, p. A21)), creates a "nexus" which distinguishes the present case from *Jackson*. Metropolitan Edison's monopoly compelled its customers to purchase from Edison a commodity which is a greater "necessity" than owning a motor vehicle. Yet, without even attempting to distinguish *Jackson's* holding that Edison's conduct was not state action, the court below summarily held that there was sufficient state involvement to support the conclusion that no-fault insurers are subject to the Due Process Clause.

The conflict between the decision below and the rulings of this Court is underscored by the Ninth Circuit's recent holding that insurance companies writing disability coverage in California were not acting "under color of state law" so as to subject them to suit under 42 U.S.C. § 1983.[16] *Life Insurance Co. of North America* v. *Reichardt*, 591 F.2d 499 (9th Cir. 1979). That case was a civil rights class action alleging that disability policies written by defendants and approved by the California

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3101(4) (App. H, p. A291). Thus, a motorist need not purchase insurance to own or register a motor vehicle in Michigan.

Furthermore, the Act does not proscribe the operation of an automobile by anyone who does not maintain the requisite security, but rather forbids only the ownership or registration of an unsecured vehicle. Section 3101(1) (App. H, p. A290). Thus, an individual is free to lease, rent or borrow and drive any vehicle for which the security is properly maintained by the owner.

15. This Court has already held that a "driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits . . . . While a driver's license, for example, 'may become [indirectly] essential in the pursuit of a livelihood,' . . . a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives." *Fuentes* v. *Shevin*, 407 U.S. 67, 89 (1972), quoting *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). (Brackets in original.)

16. The statutory prerequisite of action "under color of state law" is equivalent to the Fourteenth Amendment requirement of state action, as evidenced by the treatment accorded the two doctrines in *Jackson, supra.*

State Insurance Commission discriminated against women "who cannot obtain coverage for as long a period, must wait longer for benefits, and are charged higher premiums than men." *Id.* at 500. Affirming dismissal of the § 1983 claim against the insurers, the Ninth Circuit held that under the relevant state action decisions of this Court there was neither sufficient nexus between California and the challenged conduct nor sufficient official encouragement of that conduct to render it state action. *Id.* at 501-02. The state approval of the allegedly discriminatory policies was not sufficient because ". . . the Commissioner's approval was pro forma as in *Jackson* rather than an approval after full investigation. . . ." *Id.* at 502. Allstate's policies and rate schedules receive exactly the same "pro forma approval" from the Michigan Insurance Commissioner. Thus, although *Reichardt* involved voluntary insurance rather than the "compulsory" coverages at issue here, the Ninth Circuit's analysis of the relevant holdings of this Court demonstrates the error of the Michigan Supreme Court.

B. Insurers Providing No-Fault Coverage Do Not Perform a Public Function Which Has Traditionally Been Performed Exclusively by the State.

When the court below stated that "insurance companies are the instruments through which the Legislature carries out a scheme of general welfare" (*Shavers, supra,* 402 Mich. at 597, 267 N.W.2d at 86 (App. A, pp. A20-A21)), it may have intended to suggest a public function rationale for its state action holding. Such a suggestion, however, is contrary to the decisions of this Court.

It is true that a sufficient nexus to establish state action will be found where a private decision-maker is performing a function which has traditionally been the exclusive prerogative of the sovereign. *See* the discussion and cases cited in *Jackson, supra,* 419 U.S. at 352-53; *Flagg Bros., supra,* 436 U.S. at 157-64. However, in *Jackson,* despite the fact that Pennsylvania was plainly carrying out "a scheme of general welfare" by

granting an electric power monopoly to Metropolitan Edison, this Court explicitly rejected the argument that Edison was performing a public function. The Court held that the provision of electric power is not a traditional function of the sovereign and thus Edison's conduct was not state action:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State." 419 U.S. at 352-53.

More recently, in *Flagg Bros.*, this Court held that a warehouse which satisfied its lien by private sale under the provisions of Uniform Commercial Code ("UCC") Section 7-210, as enacted by the New York legislature, was not involved in state action because ". . . the settlement of disputes between debtors and creditors is not traditionally an *exclusive* public function." 436 U.S. at 161. (Emphasis supplied; footnote omitted.)[17]

Automobile insurance is not and never has been an exclusive function of the state.[18] It is not even traditionally associated with the sovereign.[19] Under the Act, the State of Michigan

17. The Michigan Supreme Court's suggested expansion of the public function rationale into the business of insurance is in direct conflict with this Court's stated intentions in *Flagg Bros.*:

> "Thus, even if we were inclined to extend the sovereign function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it." 436 U.S. at 163.

18. *Compare* the activities of private automobile insurers *with* the actions of private parties which have been held to constitute performance of a public function, such as the conduct of all municipal functions by a company town (*Marsh* v. *Alabama*, 326 U.S. 501 (1946)) and the conduct of a primary election for public office by a private political club (*Terry* v. *Adams*, 345 U.S. 461 (1953)).

19. In their dissent in *Flagg Bros., supra*, 436 U.S. at 171, Justices Stevens, Marshall and White rejected the Court's exclusivity requirement and defined a public function for purposes of the Due

(Footnote continued on next page.)

does not assume the duty of providing automobile insurance to its citizens. Therefore, the marketing of automobile insurance is not a public function and private insurers are not involved in state action under this standard.

C. The Act Does Not Compel or Encourage the Challenged Conduct of Insurance Companies so as to Transform That Conduct Into State Action.

This Court has found that private parties engage in state action in certain cases where state law compelled the conduct being challenged as violative of the Due Process Clause (*see, e.g., Petersen* v. *City of Greenville*, 373 U.S. 244, 247-48 (1963)) or where agents of the state prompted or encouraged parties to peform the challenged acts (*see, e.g., Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 170-71 (1970); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 721-25 (1961)).[20] While not explicitly citing or relying on the official compulsion or encouragement doctrine, the opinion below can be read to suggest that the Michigan statutes provide sufficient official compulsion to transform the conduct of private insurers into state action.[21] *Shavers, supra*, 402 Mich. at 598, 267 N.W.2d at 87 (App. A, p. A21). Any such suggestion is erroneous. *See Jackson, supra*, 419 U.S. at 354-58; *Flagg Bros., supra*, 436 U.S. at 164-66; *Moose Lodge, supra*, 407 U.S. at 175-77.

The inapplicability of the official compulsion rationale in this case is manifest from a comparison with *Jackson*, where the

(Footnote continued from preceding page.)

Process Clause as one "traditionally and historically associated with sovereignty." Automobile insurance clearly does not satisfy even this minimal test.

20. In each of these cases, as well as in all others where this Court has found state action on the basis of official compulsion or encouragement, the challenged conduct was racial discrimination.

21. The Michigan Supreme Court specifically noted that the Act specifies the extent of coverage to be provided and the conditions of payment for insurance benefits, and that it "provide[s] for the assignment of claims and risks." *Shavers, supra*, 402 Mich. at 597, 267 N.W.2d at 86 (App. A, p. A20).

challenged termination policies were embodied in a tariff approved by the Pennsylvania Public Utilities Commission. Even under those circumstances, this Court found that there was not sufficient state compulsion or encouragement of Metropolitan Edison's conduct to satisfy the state action requirement of the Due Process Clause:

> "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. *Approval by a state utility Commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action'.* At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. *Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment.*" 419 U.S. at 357. (Emphasis supplied; footnote omitted.)

Michigan's regulation of Allstate's no-fault ratemaking[22] and underwriting activities[23] is indistinguishable from Pennsylvania's

22. *See* n.12 and accompanying text *supra*, p. 11.

23. The Michigan statutes do not regulate the circumstances in which insurers may refuse to write or renew policies (except that refusal to renew without proper notice is treated by Mich. Comp. Laws § 500.3204(2) (App. H, p. A319) as cancellation). Thus, at most, the state passively tolerates the decisions of private parties by refusing to regulate them.

As to the decision to terminate a policy within the first 55 days, the Michigan statutes, like UCC § 7-210 in *Flagg Bros.*, merely announce the circumstances under which the state will not interfere with the private conduct of insurers by providing that during this period policies may be canceled without appeal by the insureds if ". . . the risk is unacceptable to the insurer." Mich. Comp. Laws §§ 500.3220(a), 500.3224(1) (App. H, p. A320). Even with

(Footnote continued on next page.)

regulation of Metropolitan Edison's ratemaking and termination activities.

The opinion below also implies that the Michigan statutory requirement that insurers provide the no-fault coverages through an assigned risk pool to any persons unable to obtain them in the voluntary market constitutes sufficient governmental compulsion to support a finding of state action. *Shavers, supra*, 402 Mich. at 597, 267 N.W.2d at 86 (App. A, pp. A20-A21). This suggestion plainly conflicts with the holdings of this Court. State action exists under the compulsion doctrine only where the court determines that the challenged conduct itself, rather than the general commercial activities of the private entity, are compelled by the state.[24] In *Jackson*, for instance, this Court rejected the contention that the challenged termination practices constituted state action under the compulsion doctrine, even though Metropolitan Edison was required by the state to furnish electric power to all consumers within the area of its monopoly (Pa. Stat. Ann. tit. 66, § 1171). *Jackson, supra*, 419 U.S. at 348 n.2, 353. Accordingly, *Jackson* is precisely analogous to the instant case; there is no distinguishing factor which can be discerned from the opinion of the court below or from the record herein.

(Footnote continued from preceding page.)

regard to mid-term cancellations after the policy has been in effect for more than 55 days, the Michigan statutes do not either compel or encourage insurers to terminate; rather, they merely limit the circumstances in which they may do so. Mich. Comp. Laws §§ 500.3212, 500.3220(b) (App. H, p. A320). *See also* n.13 and the accompanying text *supra*, p. 11. In any event, the Michigan laws already afford procedural due process protection to insureds whose policies are terminated after 55 days by requiring the Michigan Insurance Commissioner, not the insurance companies, to hold hearings upon the written request of the policyholders. Mich. Comp. Laws §§ 500.3230-500.3244 (App. H, pp. A321-A322).

24. *See, e.g., Petersen, supra*, 373 U.S. at 247-48 (state action found where statute compelled segregation of a restaurant); *Adickes, supra*, 398 U.S. at 170-71 (state action found where police officers enforced unofficial policy requiring segregation of eating facilities); *Burton, supra*, 365 U.S. at 721-25 (state action found where municipal parking authority was effectively a joint participant in operation of a segregated restaurant).

In *Flagg Bros.*, the Court extended its holding in *Jackson* by deciding that even where a statute expressly permitted certain private conduct, that conduct did not thereby become state action. Despite the fact that New York's commercial code allowed private sales to satisfy warehousemen's liens, the Court held that this statutory authorization of private activity did not convert the warehouseman's actions into those of the state, since:

> "The State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act." 436 U.S. at 166. (Emphasis in original.)

Accord, Moose Lodge, supra, 407 U.S. at 175-77.[25] Similarly, in the instant case, Michigan has "merely announced the circumstances under which its courts will not interfere with" the insurers' conduct in making and implementing the ratemaking and underwriting decisions regarding the no-fault coverages.[26]

In sum, all of the tests employed by this Court to ascertain whether the acts of private parties are to be considered state action subject to the Due Process Clause lead to the same result: the conduct of insurance companies in providing no-fault insurance in Michigan is not state action. The Michigan Supreme Court has seriously and dangerously distorted the law of state action by holding otherwise.

---

25. In *Moose Lodge,* this Court held that the grant of a liquor license to a racially discriminatory club, together with concomitant regulation by the Pennsylvania Liquor Control Board, could not support a finding of state action because Pennsylvania did not compel or encourage the discrimination policy itself.

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 176-77.

26. *See* notes 12 and 23 *supra,* pp. 11, 16-17.

II. THE DECISION BELOW WILL HAVE A SERIOUS DETRIMENTAL IMPACT ON THE BUSINESS OF AUTOMOBILE INSURANCE, ON REGULATED INDUSTRIES IN GENERAL, AND ON THE PUBLIC.

If the decision below is permitted to stand, the operations of insurance companies in every state could be subjected to the procedural constraints of the Due Process Clause of the Fourteenth Amendment.[27] According to the Michigan Supreme Court such a requirement would, "*at a minimum,*" require, *inter alia,* that every motorist be provided with the:

> ". . . opportunity to obtain a prompt and effective administrative review of an insurer's calculation of the factors, differentials and premium applicable to him and a prompt and effective administrative review of the basis for the refusal or cancellation of insurance." *Shavers, supra,* 402 Mich. at 608, 267 N.W.2d at 91 (App. A, pp. A30-A31).

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27. There is nothing in the opinion of the Michigan Supreme Court, nor in its apparent rationale, that would confine its holding to the realm of no-fault insurance. It is the compulsory nature of the insurance, not the fact that it is no-fault, which was the basis for the court's holding. Thus, since all fifty states and the District of Columbia have some form of insurance which is compulsory under the test applied by the court below, the erroneous reasoning of the Michigan Supreme Court could be applied to impose due process obligations on private insurers throughout the country. *See* Appendix I and n.29, *infra,* p. 20.

This requirement alone would dramatically increase the expense to insurers, and thus the cost to consumers, of providing automobile insurance in Michigan[28] and other states.[29]

Additionally, if private insurance companies are deemed to be engaged in state action, they may be required throughout the United States to employ costly and time-consuming formal procedures in connection with many of their other routine business decisions, including establishment of risk classifications and even the adjustment of claims. These procedures would, of course, also add markedly to the cost of automobile insurance.

28. The additional burden and expense in Michigan cannot be quantified, but its magnitude is evident from the facts contained in the record of this case. During the fiscal year ending June 30, 1973, a total of 6,148,223 motor vehicles were registered in Michigan. *See* Secretary of State's Answers to Plaintiffs' Interrogatories. Between January 1, 1973 and October 31, 1973 (for the majority of insurance company defendants below), and December 5, 1973 (for the remainder), the defendant insurance companies issued more than 402,894 insurance policies to first-time customers in Michigan. *See* the answers of each defendant insurance company to plaintiffs' interrogatories. During the same period of one year or less, those insurance companies rejected an applicant, cancelled a policy or refused to renew a policy in more than 61,666 instances. *Id.*

29. Appendix I contains an annotated chart summarizing the relevant statutes governing insurance in the forty-nine states other than Michigan and regulations in the District of Columbia (hereafter referred to as a "state" in this note). As shown there, all of the states have some type of compulsory automobile insurance. Eighteen states have some form of compulsory no-fault insurance. Twenty-three states have compulsory third party liability insurance. The remaining jurisdictions require evidence of insurance or other security from motorists who have had accidents, committed certain violations, or failed for a specific period of time to satisfy a judgment.

Every state but Illinois regulates rates, and the vast majority do so to prevent "excessive, inadequate or unfairly discriminatory" rates, just as in Michigan. Forty-eight states permit an insured who is aggrieved by a rate decision to be heard by his insurer or the regulatory agency. However, just four states now require that a hearing be held for those who are refused insurance. Only seventeen states currently require a hearing in the event that an insurer refuses to renew a policy, and only twenty-one afford the insured a hearing if his insurance is cancelled midterm.

Thus, not one of the jurisdictions in the United States currently has a regulatory scheme which satisfies the "minimum" due process requirements mandated by the Michigan Supreme Court in this case.

The decision below also exposes insurers to the requirements of substantive due process, equal protection and other constitutional constraints and to expensive litigation and possible liability for claimed violations of laws embodying these substantive rights.

In light of these potential ramifications, the continued viability of no-fault insurance itself is also threatened. No-fault coverages are an alternative to the traditional tort system of compensation, which has come under increasing attack in recent years,[30] and they have the potential for substantial social benefits, including a sizable reduction in the cost of automobile insurance.[31] Compulsory coverage is generally believed to be essential to the realization of these benefits through operation of a comprehensive and equitable no-fault insurance system.[32] If this

30. *See, e.g.,* Pub. L. No. 90-313, 82 Stat. 126 (1968). This Joint Resolution passed by Congress in 1968, embodies the following findings on the traditional tort system of automobile accident compensation:

> ". . . suffering and loss of life resulting from motor vehicle accidents and the consequent social and economic dislocations are critical national problems.
>
> ". . . there is growing evidence that the existing system of compensation is inequitable, inadequate and insufficient and is unresponsive to existing social, economic, and technological conditions.
>
> ". . . there is needed a fundamental reevaluation of such system, including a review of the role and effectiveness of insurance and the existing law governing liability."

31. After an in depth study of the traditional tort compensation system, Professor Jeffrey O'Connell urged adoption of no-fault automobile insurance throughout the United States, citing the following advantages of such a system, among others:

> "Perhaps the most significant advantage of all under no-fault auto insurance will be its lower price. It now seems indisputable, on the basis of information from a variety of sources and actuarial studies, that no-fault auto insurance can be designed to pay many more people at substantially less cost. That this is so stems from the prodigious waste of the present system." J. O'Connell, *The Injury Industry* at 110 (1971).

32. *See, e.g.,* Keeton and O'Connell, *Basic Protection for the Traffic Victim,* at 341-43 (1965).

Court fails to reverse the erroneous decision below, the staggering burden and cost of instituting the procedural mechanisms mandated by the Michigan Supreme Court will undoubtedly dissuade other states from adopting compulsory no-fault insurance despite these substantial benefits to consumers.

Finally, the Michigan Supreme Court's ruling on state action has implications which reach far beyond the insurance industry. Many businesses are regulated in ways which establish a nexus between their activities and the state which is at least as strong as the nexus between automobile insurers and the State of Michigan. Further, many of the services provided by such industries are at least as necessary to the public as driving an automobile.[33] Thus, these businesses and their customers are also threatened by the ominous impact of the decision below, which extends the constitutional constraints of due process far beyond the limitations set by this Court and well into the zone now reserved for private enterprise.[34]

---

33. Some of the businesses which involve services which are at least as essential as insurance and which are subject to similar degrees of regulation to that imposed upon insurers by the Michigan statutes were enumerated by this Court in *Jackson*:

> "Doctors, optometrists, lawyers, Metropolitan [Edison Co.], and . . . [an] upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." 419 U.S. at 354. (Footnote omitted.)

34. This Court itself has recognized the limitless scope of a decision like the one below by pointing out in *Jackson, supra,* that:

> "If the mere existence of this regulatory scheme made Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania." 419 U.S. at 350 n.7.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Michigan Supreme Court.

Respectfully submitted,

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Dated: April 16, 1979

Supreme Court, U. S.
FILED
APR 16 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1583

ALLSTATE INSURANCE COMPANY,
AN ILLINOIS CORPORATION,

Petitioner,

vs.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, et al.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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APPENDIX A

402 Mich. 554

CATHERINE SHAVERS et al.,
Plaintiffs, Appellants, Appellees and Cross-Appellees,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, RICHARD H. AUSTIN, Secretary of State of Michigan, DANIEL J. DEMLOW, Commissioner of Insurance of the State of Michigan, AETNA CASUALTY & SURETY COMPANY, the TRAVELERS INDEMNITY COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL CASUALTY COMPANY, the HOME INDEMNITY COMPANY and LEAGUE GENERAL INSURANCE COMPANY,
Defendant, Appellants, Appellees and Cross-Appellees,

and

ALLSTATE INSURANCE COMPANY,
Defendant, Cross-Plaintiff, Cross-Appellant and Appellee,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Cross-Plaintiff and Appellee,

and

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, and RIVERSIDE INSURANCE COMPANY OF AMERICA,
Defendants and Appellees.

Nos. 57916, 57935, 57934, 57931.
Supreme Court of Michigan.
June 8, 1978.

Lopatin, Miller, Bindes, Freedman & Bluestone (by Sheldon L. Miller and Victoria C. Heldman) and Philo, Cockrel, Spearman, Cooper, Rine, King & Atkinson for *plaintiffs.*

Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, and Harry G. Iwasko, Jr., Assistant Attorney General, for *defendants Secretary of State, and Commissioner of Insurance.*

Bodman, Longley, Bogle & Dahling (by Theodore Souris and James R. Buschmann) for *defendant State Farm Mutual Automobile Insurance Company.*

Dickinson, Wright, McKean, Cudlip & Moon (by W. Gerald Warren, Dawn L. Phillips, Richard J. Meyers, and Robert L. Schwartz) for *defendant Allstate Insurance Company.*

Downs & Edwards for *defendant League General Insurance Company.*

Dykema, Gossett, Spencer, Goodnow & Trigg (by James D. Tracy, Michael J. McGuigan, and Nancy C. Kurtz) for *defendants Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company of America.*

Honigman, Miller, Schwartz & Cohn (Avern Cohn and John M. Kamins, of counsel) for *defendants Aetna Casualty and Surety Company, The Travelers Indemnity Company, Hartford Accident and Indemnity Company, Continental Casualty Company, and the Home Indemnity Company.*

Amici Curiae:

Robert E. Keeton.

American Mutual Insurance Alliance, by *Foster, Swift & Collins, P.C.* (by *Webb A. Smith, David W. McKeague,* and *Michael J. Schmedlen*).

Michigan Mutual Insurance Company, by *Elijah Poxson* and *James L. Schueler.*

Progressive Casualty Company, Universal Underwriters, Midwest Mutual Insurance Company, Balboa Insurance Company, Northland Insurance Company, Reserve Insurance Company,

and National Indemnity Insurance Company, by *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* (by *D. J. Watters* and *Charles A. Huckabay*).

WILLIAMS, *J.* The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of *compulsory* insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.

The No-Fault Act, insofar as it provides benefits to victims of motor vehicle accidents without regard to "fault" (as a substitution for tort remedies which are, in part, abolished), constitutionally accomplishes its goal. After intense scrutiny of this litigation's extensive record, this Court holds that the No-Fault Act does not exceed the traditional scope of the Legislature's police power. The partial abolition of tort remedies under the act is consistent with constitutional principles articulated by this Court. The act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were under compensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination. See Part V, *infra.* Likewise, the act's property damage protection scheme reasonably relates to the valid public purposes of creating an

incentive to build safer motor vehicles, encouraging group rates, and reducing costs by eliminating the necessity of accident "fault" investigation. See Part VI, *infra.*

However, while the No-Fault Act is, in theory, a valid, rational response to problems affecting the general welfare, *the actual mechanisms for protecting the welfare of individual Michigan motorists, required by law to purchase no-fault insurance, are constitutionally deficient in failing to provide due process.* The Legislature, in the No-Fault Act and other sections of the Insurance Code, recognized the significance of a motorist's interest in the registration and operation of a motor vehicle on Michigan streets and highways. Measures were taken to assure that compulsory no-fault insurance in Michigan would be available to motorists at fair and equitable rates. These measures are, unfortunately, inadequate to protect individual motorists, who must purchase no-fault insurance from private insurers, from potentially unfair insurance rates, insurance refusal or cancellation. In particular, under the No-Fault Act and the Insurance Code:

1. The statutory protection against "excessive, inadequate or unfairly discriminatory" rates is without the support of clarifying rules established by the Commissioner of Insurance, without legislatively sufficient definition, and without any history of prior court interpretation; the legislative mandate is thus reduced to mere exhortation (see Part III—B[1] *infra*);
2. There are inadequate statutory provisions for a motorist attacking the validity of an individual rating decision (see Part III—B[1] *infra*);
3. There is no adequate statutory provision permitting an individual to challenge insurance refusal, discriminatory cancellation, or assignment to the "Automobile Placement Facility" with its presumptively higher rates (see Part III—B[2] *infra*).

The constitutional status of the No-Fault Act places this Court in an extraordinary jurisprudential position: the No-Fault Act, which has substantially affected every Michigan motorist, every insurance company underwriting motor vehicle insurance in Michigan, and our entire system of civil justice for nearly five years, is constitutional in its general thrust but unconstitutionally deficient in its mechanisms for assuring that compulsory no-fault insurance is available to Michigan motorists at fair and equitable rates.

We therefore believe it necessary, for purposes of the general jurisprudence, the general welfare of the public and the administration of justice, to hold that the No-Fault Act will remain in effect for 18 months from the issuance of this opinion.

During this period, the Legislature and the Commissioner of Insurance can remedy the act's deficiencies by taking necessary constitutional corrective action assuring that compulsory no-fault insurance is available at fair and equitable rates. The types of corrective actions necessary to remedy the act's due process deficiencies are set out in Part III—C of our opinion.

Toward the end of this period, this Court will re-examine the status of the No-Fault Act to determine whether the present constitutional deficiencies have been remedied. At that time, an appropriate order reflecting the act's constitutional status will be entered by this Court.

I.

Prior to October 1, 1973, the effective date of the No-Fault Act, 11 named plaintiffs in their own behalf and as representatives of several classes of other persons initiated this action against the Secretary of State, the Commissioner of Insurance, and 25 named automobile insurers as representatives of the entire automobile insurance industry in Michigan. The complaint sought a declaratory judgment as to the constitutionality of the No-Fault Act and an injunction against the act's enforce-

ment.[1] Plaintiffs initially had sought a temporary injunction against enforcement of the act. This relief had been denied.

An amended complaint was then filed, pursuant to an order of the trial court, on December 6, 1973, adding Michigan's Attorney General as a defendant. Additionally, the following amendments were made: one named plaintiff was dropped and eight others were added as named plaintiffs; and the assertion of rights to declaratory and injunctive relief were added on behalf of five of the named plaintiffs as property taxpayers, pursuant to GCR 1963, 201.2(3). Two the the defendant insurers, Allstate Insurance Company and State Farm Mutual Automobile Insurance Company, filed cross-complaints, challenging the constitutionality of the act's property damage protection insurance scheme, §§ 3121, 3123, 3125 and 3127.

Pursuant to GCR 1963, 301.6, Judge Horace W. Gilmore was assigned to conduct all matters preliminary to trial and to try the case. Preliminary and final pretrial conferences were conducted on four days during November and December 1973. At these conferences the parties identified legal and factual issues to be tried and stipulated to facts which were undisputed. The pretrial statement issued at the conclusion of the conferences was subsequently amended on several occasions before trial to include additional issues.

Judge Gilmore ably and commendably conducted the trial, which occupied 35 trial days, from January 14 to March 21, 1974. The parties were given every opportunity for argument; the trial record includes over 5,000 pages of transcript and over 200 exhibits.

On May 20, 1974 Judge Gilmore filed a learned and thoughtful opinion of over 100 pages. The court held that plaintiffs had standing to raise every constitutional objection they asserted pursuant to the "taxpayers' suit" rule, and statute (GCR 1963, 201.2[3]; MCL 600.2041; MSA 27A.2041), and the declaratory judgment rule (GCR 1963, 521.1) The court also held

1. This action was brought subsequent to the issuance of this Court's *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 469 (1973).

that the No-Fault Act did not significantly infringe or penalize plaintiffs' constitutional "right to travel." The court held constitutional:

§ 3101(1), which requires the purchase of no-fault insurance as a condition precedent to registration and operation of a motor vehicle;

The penalties imposed for non-compliance with the act's compulsory insurance requirement (§ 3102[2])

the act's personal injury protection insurance scheme;

the limitation of $1,000 for no-fault funeral and burial expenses (§ 3107);

the classification between workers in the home and workers outside the home in terms of maximum benefits payable in case of injury (§ 3107);

the delegation of authority to the Commissioner of Insurance to approve deductibles as provided in § 3109a of the act;

§ 3102(1), which requires that nonresident motorists maintain no-fault insurance when in Michigan for an aggregate of more than 30 days in any calendar year;

§ 3116 which, read in light of § 3135, can be interpreted to mean that an insurer paying personal injury insurance benefits is entitled to reimbursement from the tort recovery of an injured person to the extent that the tort recovery includes damages for losses for which personal injury insurance benefits were paid;

§ 3114, which requires that a person who suffers accidental bodily injury while an operator or passenger of a motor vehicle engaged in the business of transporting passengers seek personal injury insurance benefits from the insurer of the vehicle.

The court held unconstitutional:

the act's property damage protection insurance scheme;

§ 3101(2), which excludes two-wheel vehicles from coverage under the act;

§ 3107(b), which requires that the cost of replacement for ordinary and necessary services be "reasonably incurred" before reimbursement;

§ 3109(1), which requires that benefits provided or required to be provided under the laws of any state or the federal government be subtracted from personal injury insurance benefits;

the delegation of authority to the Commissioner of Insurance to approve deductibles as provided in § 3109(3) of the act;

§ 3113, which denies injured "transient" nonresident motorists who have not purchased no-fault insurance or whose insurer has not filed a certificate in compliance with § 3163 personal injury insurance benefits and tort recovery below the threshold of § 3135(2).

The court also held that the sections of the act declared unconstitutional were severable.

On June 25, 1974, the trial court issued its declaratory judgment. Upon entry of this judgment, plaintiffs moved for a new trial. After a hearing, this motion was denied by the court.

Plaintiffs and various defendants appealed to the Court of Appeals.

Application for leave to appeal to this Court prior to decision by the Court of Appeals was filed on August 21, 1974, by all defendants and was denied by this Court December 23, 1974.

Thereafter, upon review of the record and the hearing of arguments, the Court of Appeals issued its opinion November 5, 1975.[2]

The Court of Appeals disagreed with the trial court that the "taxpayers' suit" rule and statute, *supra,* were applicable to the instant case. 65 Mich App 355, 362; 237 NW2d 325 (1975). The Court then found plaintiffs had standing under the declara-

2. *Shavers* v *Attorney General,* 65 Mich App 355; 237 NW 2d 325 (1975).

tory judgment rule, *supra,* to challenge a limited number of issues.[3]

The Court of Appeals held constitutional the act's personal injury protection scheme (affirming the trial court), 65 Mich App 355, 365-367, and the act's exclusion of two-wheel vehicles from compulsory no-fault coverage (overruling the trial court), 65 Mich App 355, 367-368. The Court held unconstitutional

3. The Court of Appeals in its opinion structured its "standing" analysis in terms of the trial court's declaratory judgment. The Court stated that plaintiffs, under the declaratory judgment rule, had not shown a required "case of actual controversy" with respect to "Paragraphs C, D, E, F, and H of the court's judgment". 65 Mich App 355, 363. In terms of the trial court's declaratory judgment, this meant that plaintiffs did not have standing to challenge:

—the constitutionality of § 3107(b)'s requirement that the cost of replacement for ordinary and necessary services be "reasonably incurred" before reimbursement (Paragraph C of the declaratory judgment);

—the constitutionality of the delegation of authority to the Commissioner of Insurance to approve deductibles as provided in § 3109(3) of the act (Paragraph D of the declaratory judgment);

—the constitutionality of § 3109(1)'s requirement that benefits provided or required to be provided under the laws of any state or the federal government be subtracted from personal insurance injury benefits (Paragraph E of the declaratory judgment);

—the constitutionality of § 3113(c) and § 3135(2) of the act as they pertain to "transient" non-resident motorists (Paragraph F of the declaratory judgment);

—the interpretation of § 3116 of the act, which pertains to the subtraction of tort recovery from personal injury insurance benefits (Paragraph H of the declaratory judgment);

The Court of Appeals held that plaintiffs' action for declaratory judgment on the issues found in Paragraphs A, B, and G of the trial court's judgment was appropriate. 65 Mich App 355, 363-364. Paragraph A of the trial court's declaratory judgment stated, in pertinent part, "the act, including § 3109a. thereof, does not violate any provision of the United States and Michigan Constitutions except as hereinafter specifically declared". Paragraph B declared the exclusion of two-wheel vehicles from the act's coverage unconstitutional. Paragraph G declared the act's property protection insurance scheme unconstitutional. Although the Court of Appeals held that plaintiffs had standing to challenge all issues "found" in Paragraph A of the

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the act's property damage protection scheme (affirming the trial court), 65 Mich. App. 355, 368-370. The Court also held that the unconstitutional property damage protection scheme was severable. 65 Mich. App. 355, 372.

On November 25, 1975, plaintiffs filed a motion for rehearing with the Court of Appeals challenging the findings of the Court of Appeals in its opinion but, more specifically, requesting the Court of Appeals remand the case for further testimony consistent with GCR 1963, 820.1(5). Plaintiffs' motion for rehearing in the Court of Appeals was denied on December 17, 1975. On January 9, 1976, plaintiffs filed a motion for leave to appeal to this Court. Leave was granted on May 27, 1976.

II.

A crucial threshold question concerns plaintiffs' standing to raise certain issues.

Plaintiffs first seek to establish standing to challenge the constitutionality of the No-Fault Act under the court rule and statute which creates a "taxpayers' suit". GCR 1963, 201.2(3) and MCL 600.2041; MSA 27A.2041, which are identical, deal with real parties in interest. The rule and statute provide in pertinent part:

> "Every action shall be prosecuted in the name of the real party in interest * * * and further
>
> * * *
>
> "3) An action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought * * * in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside."

(Footnote continued from preceding page.)
declaratory judgment, *i.e.*, all issues declared constitutional by the trial court, the Court only addressed one of these issues, namely, the constitutionality of the act's personal injury protection insurance scheme. *The Court did not address the other issues found constitutional by the trial court although it stated plaintiffs had standing to raise them.*

The trial court held that plaintiffs had standing under the rule and statute to raise every constitutional objection they asserted. The Court of Appeals reversed, declaring:

> "We disagree with the trial court's ruling that the court rule provides a basis for plaintiffs' suit. Plaintiffs are not concerned with the illegal expenditure of state funds. The court rule allows taxpayers aggrieved by the outlay of state funds to hurdle the traditional standing obstacle in taxpayers suits. We do not read it as permitting a group to challenge any legislation merely because of an incidental expenditure of state funds; almost all legislation involves some public spending. GCR 1963, 201.2(3) is inapplicable to this litigation." 65 Mich App 355, 362.

We agree. The No-Fault Act does not, on its face, contemplate the "expenditure of state funds". We do not believe that the "taxpayers' suit" rule and statute is intended to give plaintiffs standing to "test the constitutionality" of an entire act when the expenditure of funds alleged is incidental to its implementation. Compare *Hertel* v. *Racing Commissioner*, 68 Mich App 191; 242 NW2d 526 (1976); *Jones* v. *Racing Commissioner*, 56 Mich App 65; 223 NW2d 367 (1974).[4]

Alternatively, both plaintiffs and cross-plaintiffs seek to establish standing under the GCR 1963, 521.1 declaratory judgment rule. GCR 1963, 521.1 provides:

> "In a case of actual controversy within its jurisdiction, any circuit court of this state may declare the rights and other legal relations of any interested party seeking a decla-

4. We do not believe that the cases relied on by the trial court in reaching its holding are persuasive. In *Bode* v *Barrett*, 412 Ill 204, 206; 106 NE2d 521, 523 (1952), plaintiffs challenged statutes which expressly controlled the raising and expenditure of state funds. *Blair* v *Pitchess*, 5 Cal 3d 258; 96 Cal Rptr 42; 486 P2d 1242 (1971), involved an attack on a statute which, though not contemplating the expenditure of state funds, did directly and immediately involve county officials. However, we reject this approach to taxpayers' suits because it would, if adopted, virtually abolish the law of standing, a result not clearly contemplated by GCR 1963, 201.2(3) and MCL 600.2041; MSA 27A.2041.

We also note that the Illinois and California "taxpayers' suit" statutes do not include language similar to the Michigan statute's "to test the constitutionality of a statute relating thereto".

ratory judgment, whether or not relief is or could be sought or granted."

The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people. 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), Committee Comment, p 683; *Comm'r of Revenue* v. *Grand Trunk W R Co,* 326 Mich 371, 375; 40 NW2d 188 (1949).

The existence of an "actual controversy" is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights. *Updegraff* v. *Attorney General,* 298 Mich 48, 52; 298 NW 400 (1941); *Flint* v. *Consumers Power Co,* 290 Mich 305, 309-310; 287 NW 475 (1939); see, also, *Welfare Employees Union* v. *Civil Service Comm,* 28 Mich App 343, 350-351; 184 NW2d 247 (1970).

This requirement of an "actual controversy" prevents a court from deciding hypothetical issues. However, a court is not precluded from reaching issues before actual injuries or losses have occurred. *Merkel* v. *Long,* 368 Mich 1, 11-14; 117 NW2d 130 (1962). Also, before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, *i.e.,* a plaintiff must allege and prove an actual *justiciable* controversy. See *Kuhn* v. *East Detroit,* 50 Mich App 502; 213 NW2d 599 (1973).

Therefore, what is essential to an "actual controversy" under the declaratory judgment rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.

The five plaintiffs who testified at trial all owned an automobile. Two had purchased no-fault insurance and three had not. One of the plaintiffs who had purchased no-fault insurance, Melvin Janasevich, testified that he was a retiree with no work

income who cares for his paralyzed, wheelchair-confined wife. Plaintiffs' amended complaint names three persons who are "motorcycle owners and operators"; defendants' answer admits the status of these plaintiffs.[5] Also, it was undisputed on the record that the cross-plaintiff insurance companies who challenge the validity of the property damage provisions of the No-Fault Act were required to issue insurance policies in compliance with the act if they wished to continue to underwrite in Michigan.

This Court deeply appreciates that the No-Fault Act, in radically redefining the nature of Michigan's motor vehicle insurance, profoundly and importantly affects a crucial dimension of our lives. We are also aware that the constitutionality of this act has been in question since this action was commenced in August, 1973. In light of the record and our belief that plaintiffs, cross-plaintiffs, and the people of the State of Michigan deserve as definitive a decision on the challenges to the No-Fault Act as judiciously can be afforded within the parameters of the above stated rules for declaratory relief, we hold that plaintiffs and cross-plaintiffs have established standing under GCR 1963, 521.1 to raise the following issues:

1) whether § 3101, which requires registrants and operators of motor vehicles to maintain compulsory personal injury protection insurance, property protection

5. The five plaintiffs who testified at trial were Eric Gentile, who owned an automobile but who had not purchased no-fault insurance; Melvin Janasevich, who owned an automobile and who had purchased no-fault insurance; John Shano, who owned an automobile but who had not purchased no-fault insurance; Raymond Hullum, who owned an automobile and who had purchased no-fault insurance; Frederick Boyd, who owned an automobile and who had not purchased no-fault insurance.

Plaintiff Janasevich testified that he was retired and that he has to take care of his paralyzed, wheelchair-confined wife.

The three plaintiffs named as "motorcycle owners and operators" in plaintiffs' amended complaint were Steven Makella, Linda Chamberlain and John Savard. For defendants' admission of this status in their answers, see Joint Appendix, pp. 65a, 77a, 88a.

damage insurance, and residual liability insurance, is constitutional;[6]

2) whether the act's personal injury protection insurance scheme violates the due process and equal protection clauses of the Michigan and United States Constitutions[7] (Const 1963, art 1, §§ 2, 17; US Const, Am XIV);

3) whether the act's property damage protection insurance scheme violates the due process and equal protection clauses of the Michigan and United States Constitutions;[8]

4) whether § 3101(2), in excluding two-wheel motor vehicles from coverage under the act, violates the equal protection clauses of the Michigan and United States Constitutions;[9]

5) whether the act's statutory scheme with respect to work-loss reimbursement and reimbursement for replacement services, § 3107, violates the equal protection

6. Plaintiffs who have not purchased no-fault insurance would be exposed to criminal (see § 3102[2]) and civil (see § 3135[2]) penalties if the compulsory insurance requirement under the act is constitutional. If the compulsory insurance requirement under the act is unconstitutional, plaintiffs who have purchased no-fault insurance are entitled to a determination of this issue in order to guide their future conduct.

7. Plaintiffs who have purchased no-fault insurance would be exposed to tort liability without insurance reimbursement if the tort immunity vis-a-vis the personal injury protection insurance under the act is held unconstitutional.

8. Cross-plaintiffs State Farm and Allstate, if they wish to underwrite property damage protection insurance in Michigan, must do so pursuant to §§ 3121, 3123, 3125, and 3127 of the act. Plaintiffs who have purchased no-fault insurance would be exposed to tort liability without insurance reimbursement if the tort immunity vis-a-vis the property damage protection insurance under the act is held unconstitutional.

9. Plaintiff motorcycle owners and operators might be required to purchase no-fault insurance or be exposed to criminal (see § 3102[2]) and civil (see § 3135[2]) penalties if the two-wheel motor vehicle exclusion is held unconstitutional.

clauses of the Michigan and United States Constitutions;[10]

6) whether the act's statutory schemata with respect to nonresident, out-of-state motorists, § 3102(1), which requires nonresident motorists to maintain no-fault insurance when they are in Michigan "an aggregate of more than 30 days in any calendar year", and § 3113 read *inter alia* with § 3135(2), which pertains to transient nonresident motorists, violate the due process and equal protection clauses of the Michigan and United States Constitutions.[11]

We do not reach two issues because they are not necessary to decision and appear to have been abandoned.[12] Also, we do not believe these plaintiffs have established standing under the declaratory judgment rule as to three issues.[13] Two of these

10. Plaintiff Janasevich, who has purchased no-fault insurance and who is a retiree caring for a paralyzed, wheelchair-confined wife, might be exposed to discrimination under this statutory scheme if he were injured in a motor vehicle accident.

11. Plaintiffs who have purchased no-fault insurance would be exposed to tort liability without insurance reimbursement if these schemata are held unconstitutional.

12. These issues are (1) whether, under § 3114, it is constitutionally permissible to require a person suffering accidental bodily injury while an operator or passenger of a motor vehicle operated in the business of transporting passengers to seek personal protection insurance benefits from the insurer of the vehicle and (2) whether the $1,000 maximum limit for funeral and burial expenses under § 3107 is constitutional.

We note that we do not remand the issues not addressed by the Court of Appeals for which we have found standing (issues 1, 5, and 6, *supra*) because of the importance of the issues involved and the public's need for a prompt decision. GCR 1963, 852.1 and 865.1.

13. Plaintiffs have not established standing to raise three issues, for the reasons stated: (1) whether, under § 3116 of the act, tort claim recoveries must be subtracted from personal injury protection benefits. There is no proof on the record that any plaintiff had realized a tort claim which an insurer subtracted from the personal injury protection benefits which he received or to which he was entitled. (2) Whether, under § 3109(1) of the act, government

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issues are properly before this Court in *Workman* v *Detroit Automobile Inter-Insurance Exchange*, Docket No. 58106; and *O'Donnell* v *State Farm Mutual*, Docket No. 58833.

III.

The first and most important issue before us, stated in its general terms, is whether § 3101(1) of the act, which requires registrants and operators of motor vehicles to maintain *compulsory* personal injury protection insurance, property damage insurance, and residual liability insurance, is constitutional.[14]

(Footnote continued from preceding page.)

benefits must be subtracted from personal injury protection benefits. There is no proof on the record that any plaintiff had a claim for an injury which had been denied or reduced on account of the fact he received government benefits. (3) Whether the Legislature, in conferring authority upon the Commissioner of Insurance to approve deductibles under § 3109(3) and § 3109a of the act (added by 1974 PA 72), constitutionally delegated its legislative power. There is no proof on the record that the Commissioner had approved any deductibles pursuant to these provisions. We note that the issue of whether § 3109(3) constitutes a valid delegation of legislative power has been properly before the Court of Appeals. See, *Davidson* v *Johnson*, 76 Mich App 497; 257 NW2d 139 (1977); *Davidson* v. *Johnson (On Rehearing)*, 79 Mich App 660; 262 NW2d 887 (1977); *Porter* v. *Michigan Mutual Liability Co.*, 80 Mich App 145; 263 NW2d 318 (1977).

14. The trial court held that "§ 3101(1), requiring the purchase of no-fault insurance, is constitutional".

Plaintiffs did not expressly appeal this issue to the Court of Appeals or to this Court. However, certain defendants admitted this issue was contested and addressed it in their briefs before this Court. See, Briefs of Defendants-Appellees Allstate Insurance Company, pp. 45-47; League General Insurance Company, pp. 17, 35-36; Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company of America, pp. 13-14; see, also, Brief of Amicus Curiae Progressive Casualty Company, *et al.*, p. 1.

A general concern with the impact of the No-Fault Act's compulsory insurance requirement has been a constant underlying issue throughout the litigation of this case. Plaintiffs have repeatedly voiced objection to the imposition of compulsory no-fault insurance without regard to its financial impact. See, Plaintiffs' Complaint and Plaintiffs' Second Amended Complaint. At trial, the trial court barred testimony concerning the application of the compulsory insurance requirement and its financial impact, perceiving the issue

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We perceive the issue of the constitutionality of the "compulsory insurance requirement" of § 3101(1) to be, in essence, two-fold:

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as solely one of law. However, at pretrial, the court recognized, and the parties agreed, "* * * that the issue of whether there are adequate guidelines to guide the Insurance Commissioner is clearly before the court and must be determined, especially in view of the fact that the statute now requires all motorists to carry insurance or to provide other security". The trial court did not address this "sub-issue" in its opinion. In their brief before the Court of Appeals, plaintiffs argued:

> "When the Legislature refuses to establish adequate guidelines for rates, it actually encourages illegal rate discrimination. Discriminatory rates are the end result when no sufficient guidelines are established. Because the act does not furnish adequate guidelines to the Insurance Commissioner in setting rates, and the act does not establish adequate guidelines for the Secretary of State in approving security, the 'no fault' act must be unconstitutional. There cannot be a constitutional compulsory system without sufficient guidelines to establish, implement, and operate the legislative intent."

The Court of Appeals did not address this "sub-issue." Plaintiffs, in their brief before this Court, once again made reference to it. See, Plaintiffs-Appellants Brief on Appeal, pp. 2, 22 and Supplementary Brief on Appeal, pp. 34-36.

Although plaintiffs did not expressly raise on appeal the issue decided by the trial court, "Can the Legislature constitutionally, as a condition precedent to [registration and] operation of a motor vehicle, require the purchaser of no-fault personal protection insurance and no-fault property protection insurance * * *" we feel compelled to address it because of its basic, threshold importance to any decision we might render as to the No-Fault Act's constitutionality.

Plaintiffs forcefully challenged the due process sufficiency of the act's regulatory scheme before the trial court, in its brief before the Court of Appeals, and, by reference, before this Court (during oral argument plaintiffs requested that this Court "make reference to and use [their] Court of Appeals brief on any issues that were otherwise inadequate or deficient in this reviewing court"). As indicated *supra*, the trial court viewed this challenge as a "delegation" issue. The Court of Appeals did not even address plaintiffs' crucial challenge.

After five years of uncertainty as to the constitutionality of the No-Fault Act, we believe the people of the State of Michigan deserve an opinion which addresses this crucial constitutional challenge to the No-Fault Act's regulatory scheme head-on.

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(A) Can the Legislature constitutionally, as a condition precedent to registration and operator of a motor vehicle, require the purchase of no-fault personal protection insurance and no-fault property protection insurance, or in the alternative require security approved by the Secretary of State?

(B) Does the present regulatory scheme for compulsory no-fault insurance sufficiently protect the interest of registrants and operators of motor vehicles in accord with the due process clause of the Michigan and United States Constitutions as to

(1) the fairness of insurance rates, and

(2) the proper availability of insurance.

(A) *Compulsory No-Fault Insurance*

Before the advent of no-fault insurance, the power of the Legislature to require all motorists to obtain mandatory liability insurance as a prerequisite to receipt of a driving license was well-established.[15] The United States Supreme Court recently observed in *Bell* v *Burson*, 402 US 535, 539; 91 SCt 1586; 29 L Ed 2d 90 (1971):

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This challenge could be considered on the basis of whether the act's regulatory scheme contains sufficient protections to pass muster as a constitutional delegation by the Legislature. However, this opinion analyzes plaintiffs' due process challenge in two steps: first, does the requirement that Michigan motorists must purchase no-fault insurance in order to register and operate a motor vehicle create an entitlement to fairness and availability of such insurance; second, if there is such an entitlement, does the No-Fault Act on its face, or on its face complemented by proper agency rules and regulations, indicate that due process has been complied with in terms of plaintiff motorists' "entitled" interest. *See* discussion, Part III(B), *infra*.

15. Michigan's No-Fault Act is generally recognized to be "compulsory," not "mandatory". The distinction is a semantic one made by those acquainted with insurance terms of art. Insurance is "mandatory" in nature when the buyer can choose whether or not to purchase insurance, but if he chooses to purchase insurance, he must purchase a specific type of insurance. Insurance is "compulsory" if the buyer must purchase a specific type of insurance, *i.e.*, the buyer has no choice in whether or not he purchases insurance.

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. *Ex parte Poresky*, 290 US 30; 54 SCt 3; 78 L Ed 152 (1933); *Continental Baking Co* v *Woodring*, 286 US 352; 52 SCt 595; 76 L Ed 1155; 81 ALR 1402 (1932); *Hess* v *Pawloski*, 274 US 352; 47 SCt 632; 71 L Ed 1091 (1927)."

The highest courts of eight states have reviewed their states' no-fault automobile insurance laws.[16] Every court which has considered the issue of whether a legislature, within its police power, can require no-fault insurance as a condition precedent to the operation of a motor vehicle, has answered in the affirmative.[17] This Court also holds that the Michigan Legislature has authority under its police power to compel the purchase of no-fault insurance.

The No-Fault Act's self-insurance concept is embraced within the traditional scope of the police power as stated in the maxim "sic utere tuo ut alienum non laedas" ("so use your own that you do not injure that of another"). 16 Am Jur 2d, Constitutional Law, § 267, p 523. The insurance required under

16. *Gentile* v. *Altermatt*, 169 Conn 267; 363 A2d 1 (1975), *appeal dismissed* 423 US 1041 (1976); *Montgomery* v. *Daniels*, 38 NY2d 41; 340 NE2d 444 (1975); *Singer* v *Shepperd*, 464 Pa 387; 346 A2d 897 (1975); *Lasky* v. *State Farm Ins. Co*, 296 So 2d 9 (Fla, 1974); *Manzanares* v *Bell*, 214 Kan 589; 522 P2d 1291 (1974); *Opinion of the Justices May 14, 1973*, 113 NH 205; 304 A2d 881 (1973); *Grace* v. *Howlett*, 51 Ill 2d 478; 283 NE2d 474 (1972); and *Pinnick* v *Cleary*, 360 Mass 1; 271 NE2d 592 (1971). See, also, *Rybeck* v *Rybeck*, 141 NJ Super 481; 358 A2d 828 (1976), appeal dismissed per curiam as moot, 150 NJ Super 151, 375 A2d 269 (1976), and *Andrew* v *State*, 238 Ga 433; 233 SE2d 209 (1977).

17. Only the Courts in *Pinnick*, 360 Mass 1, 25 and *Gentile*, 169 Conn 267, 302-303, expressly approved the involvement of private companies in the insurance rate scheme. However, in *Pinnick*, although the court expressed an opinion on the subject, the Massachusetts No-Fault Act was not compulsory. In *Gentile* the court relied, without examination, on the existence of statutory protection against underwriting and ratemaking abuses by insurers and the state's assigned risk plan.

the No-Fault Act protects not only the driver of a motor vehicle, but also passengers, pedestrians, owners of fixed property, and owners of properly parked vehicles. Furthermore, the operation of a motor vehicle, even when it affects no one but the driver,[18] results in serious and immediate danger to a large section of society. *West Coast Hotel Co* v *Parrish*, 300 US 379, 394; 57 S Ct 578; 81 L Ed 703 (1937). This principle, that those who use the public highways may properly be required to provide security for loss that may predictably be suffered by others on account of such use, can properly be extended to require security for the loss that the state itself might otherwise incur on account of such use.

(B) *Due Process*

The protections of the due process clause can only be invoked when there has been state action. *Jackson* v. *Metropolitan Edison Co*, 419 US 345, 349-350; 95 S Ct 449; 42 L Ed 2d 477 (1974).

The No-Fault Act compels insurance for all motor vehicles; failure to comply with this requirement may result in criminal and civil sanctions.[19] In addition, the No-Fault Act specifies the extent of coverage to be provided and the conditions of payment for insurance benefits.[20] Finally, the No-Fault Act and the Insurance Code provide for the assignment of claims and risks.[21] In effect, insurance companies are the instruments through

18. We recognize that the aforementioned pre-no-fault case law dealt exclusively with mandatory liability or third-party insurance and is therefore distinguishable from the instant no-fault insurance scheme which additionally compels first-party or self-insurance. See, Woodroof, Fonseca & Squillante, Automobile Insurance & No-Fault Law (New York: The Lawyers Co-operative Publishing Co, 1974), p. 355.

19. See MCL 500.3102(2); MSA 24.13102(2) and MCL 500.3135(2); MSA 24.13135(2).

20. See MCL 500.3105 *et seq.*; MSA 24.13105 *et seq.*

21. See MCL 500.3171 *et seq.*; MSA 24.13171 *et seq.* and MCL 500.3301 *et seq.*; MSA 24.13301 *et seq.*

which the Legislature carries out a scheme of general welfare. This legislation goes beyond a grant of a monopoly or an attempt to regulate a utility; there exists "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the [regulated entity] may fairly be treated as that of the State itself". *Jackson* v. *Metropolitan Edison Co*, *supra*, 419 US 345, 351.

The interest of plaintiffs that is affected by compulsory no-fault insurance is not a previously recognized common-law or constitutional right.

This Court, however, has recognized that the concepts of "liberty" and "property" protected by due process "are not to be defined in a narrow or technical sense but are to be given broad application". *Bundo* v. *Walled Lake*, 395 Mich 679, 690; 238 NW2d 154 (1976). See, also, *Board of Regents* v. *Roth*, 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 (1972), and *Perry* v. *Sindermann*, 408 US 593, 601, 92 S Ct 2694, 33 L Ed 2d 570 (1972).

The existence of interests or benefits entitled to due process protection depends on the extent to which government activity has fostered citizen dependency and reliance on the activity. We are reminded: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined". *Board of Regents* v. *Roth*, 408 US 564, 577 *The Supreme Court, 1975 Term*, 90 Harv L Rev 86-104 (1976); Tribe, American Constitutional Law, pp 514, 522; *Pennsylvania Coal Mining Ass'n* v. *Insurance Dep't*, 471 Pa 437; 370 A2d 685 (1977).

In Michigan the independent mobility provided by an automobile is a crucial, practical necessity; it is undeniable that whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life.

The cases, statutes and rules affecting the issuance of drivers' licenses reflect an appreciation of the importance of the access

to motor vehicles.[22] *Crampton* v. *Dep't. of State*, 395 Mich 347, 235 NW2d 352 (1975), and *Gargagliano* v. *Secretary of State*, 62 Mich App 1, 11-12; 233 NW2d 159 (1975), opinion by N. J. KAUFMAN, J.

A driver's license, once issued, is a significant interest subject to constitutional due process protections. *Bell* v *Burson*, 402 US 535, 539; 91 S Ct 1586; 29 L Ed 2d 90 (1971). Although the compulsory insurance requirement of the No-Fault Act does not directly affect the issuance of a driver's license, it directly affects the use of such a license: a licensee may not register or operate a motor vehicle in Michigan without no-fault insurance. A driver's license is, clearly, of little use unless a licensee can register and operate a motor vehicle. We believe that the interest in registering and operating a motor vehicle is as significant as the interest in the use of a driver's license.

In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates. Consequently due process protections under the Michigan and United States Constitutions (Const 1963, art 1, § 17; US Const Am XIV) are operative.

The Legislature has, additionally, fostered the expectation that no-fault insurance will be available at fair and equitable rates. Section 2403(1)(d) of the Insurance Code states that "Rates shall not be excessive, inadequate or unfairly discriminatory", MCL 500.2403(1)(d); MSA 24.12403(1)(d); § 3301(1)(a) of the Insurance Code provides the "guarantee" that no-fault insurance coverage "will be available to any person

22. Various statutes and regulations carefully monitor the licensing of drivers in this state. MCL 257.320(a); MSA 9.2020(a); MCL 257.322; MSA 9.2022; 1974 AACS R 257.1-257.5.

who is unable to procure such insurance through ordinary methods". MCL 500.3301(1)(a); MSA 24.13301(1)(a).[23]

We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis. The availability of no-fault insurance and the no-fault insurance rate regulatory scheme are, accordingly, subject to due process scrutiny.[24]

(1) In scrutinizing the statutory scheme for regulating insurance companies' underwriting and rate-making practices, we must look beyond the No-Fault Act itself to other provisions of the Insurance Code, including the Uniform Trade Practices Act, MCL 500.2400 *et seq.;* MSA 24.12400 *et seq.*, and MCL 500.2001 *et seq.;* MSA 24.12001 *et seq.*

Under the present regulatory scheme, rates and rate-making factors are proposed and supporting material is filed by private insurance companies. MCL 500.2406; MSA 24.12406. The Commissioner of Insurance may approve or reject the proposed rates and rate-making factors. If he takes no action within

23. This is a separate and independent basis for invoking due process protection for Michigan motorists required to purchase no-fault insurance. See *Viculin* v *Dep't of Civil Service*, 386 Mich 375, 387; 192 NW2d 449 (1971); see, also, *Paul* v *Davis*, 424 US 693, 710-711; 96 S Ct 1155; 47 L Ed 2d 405 (1976); *Bishop* v *Wood*, 426 US 341; 96 S Ct 2074; 48 L Ed 2d 684 (1976); *Meachum* v *Fano*, 427 US 215, 226; 96 S Ct 2532; 49 L Ed 2d 451 (1976); *The Supreme Court, 1975 Term*, 90 Harv L Rev 86-104 (1976).

24. We note that at least two courts have held that consumers have an insufficient interest to invoke due process with respect to utility rates. *Holt* v *Yonce*, 370 F Supp 374 (D SC 1973); *Sellers* v. *Iowa Power & Light Co*, 372 F Supp 1169 (SD Iowa, 1974). We believe these cases are distinguishable from the instant challenge to the no-fault insurance rate-making scheme. First, insurance underwriting and rate-making, unlike utility rate-making, inherently involves discrimination among individuals. Insurance policies are written in accord with an insurance company's perception of an individual's risk. Serious equal protection issues are, thereby, implicated. Second, no history of careful rate-regulation exists with respect to the insurance industry. Lewis, Comment: *Insurance Rate Regulation in Pennsylvania: Does the Consumer Have a Voice?*, 81 Dickinson L Rev 297, 304-305 (1977).

30 days, however, "the filing shall be deemed to meet the requirements of this chapter". MCL 500.2408; MSA 24.12408.

An alternative method for filing provides that an insurance company can specify the date upon which the rate becomes effective. The Commissioner of Insurance then has 15 days within which to act on that filing. If the filing is not disapproved within 15 days of the filing, "the filing shall be deemed to be approved". MCL 500.2430; MSA 24.12430.

The Insurance Code also provides that rating plans may measure any differences among risks that *may* have a probable effect upon losses or expenses. However, such rates shall not be "excessive, inadequate or unfairly discriminatory". MCL 500.2403; MSA 24.12403. See, also, MCL 500.2027; MSA 24.12027.

Manuals pertaining to classifications, rules and rates, rate plans and every modification of any of the foregoing must be filed with the Commissioner of Insurance. MCL 500.2406; MSA 24.12406.

The no-fault insurance rate classifications adopted by the insurance industry are allegedly the result of competition, not the governmental process. Private insurance companies are, and should be, primarily concerned with making a profit, while providing a public service.

We also recognize that it is within the Legislature's authority to prescribe that rates shall be primarily set by competition in the marketplace. However, due process, at a minimum, requires that rates are not, in fact, "excessive, inadequate or unfairly discriminatory" and, further, that persons affected have notice as to how their rates are determined and an adequate remedy regarding that determination.

Although the Legislature has provided some due process protection, significant deficiencies remain. First, the entire rate structure is suspect. The statutory stricture against "excessive, inadequate or unfairly discriminatory" rates is without the support of clarifying rules established by the Commissioner, without legislatively sufficient definition, and without any history of prior court interpretation. The legislative due process mandate is thus reduced to mere exhortation. When we add that the statute authorizes insurers to utilize any classification scheme which "may measure any differences among risks that *may* have a *probable* effect on losses or expenses" (emphasis added), it becomes clear that rates can be established on insubstantial bases which do not satisfy due process.[25] Absent administrative rules or legislative definition giving substance to the statutory language, there are inadequate safeguards against arbitrary action or invidious discrimination. Davis, *Administrative Law of the Seventies*, § 6.13 (collecting cases).

Second, the present system of rate regulation denies due process to the motorist attacking the validity of a rate. Filings and supporting information submitted by insurers are open to public inspection only after the filing becomes effective. MCL 500.2406; MSA 24.12406. This certainly is questionable due process. Also, under the Insurance Code, if a complainant, upon administrative review, can convince the Commissioner of Insurance that a filed rate does not meet the statutory requirements, the Commissioner will determine that "within a reasonable period thereafter, such filing shall be deemed no longer effective". MCL 500.2420; MSA 24.12420. This leaves the complainant with the unacceptable choice of paying the invalid

25. See, Insurance Bureau, Michigan Department of Commerce, *A Report to the Governor on Essential Insurance in Michigan* (1977), where the Commissioner of Insurance writes, p. 35:

> "Most importantly, the present law provides completely insufficient tools for insuring that rates are not unfairly discriminatory. It authorizes companies to uitilize any classification scheme which '* * * *may* measure any differences among risks that *may* have a probable effect on losses or expenses.' "

rate from the date of the effective filing until the subsequent date when the filing is no longer effective or taking the risk of not having insurance. This is certainly not due process.[26]

(2) In scrutinizing the statutory scheme affecting the availability of no-fault insurance, we again look beyond the No-Fault Act itself to the Insurance Code, Chapter 20, the Uniform Trade Practice Act, MCL 500.2001 *et seq.;* MSA 24.12001 *et seq.*, and Chapter 33, the "Automobile Placement Facility" (or "assigned risk plan"), MCL 500.3301 *et seq.;* MSA 24.13301 *et seq.*

Under § 2027 of the Uniform Trade Practices Act, the Legislature statutorily defines "[u]nfair methods of competition and unfair or deceptive acts or practices in the business of insurance" as including "[r]efusing to insure, or refusing to continue to insure * * * an individual" for a number of patently discriminatory reasons. MCL 500.2027; MSA 24.12027.

In establishing the "Automobile Placement Facility", the Legislature expressly provided "the guarantee that automobile insurance coverage will be available to any person who is unable to procure such insurance through ordinary methods". MCL 500.3301(1)(a); MSA 24.13301(1)(a).

However, although § 2027 of the Uniform Trade Practices Act attempts, through the good offices of the Commissioner of Insurance, to protect from discrimination a motorist who is refused no-fault insurance or whose no-fault insurance is cancelled, the act does not provide such motorists with an individual legal remedy for challenging an alleged discriminatory basis for the refusal or cancellation.[27] See *Wolff* v. *McDonnel,* 418 US 539, 557-558; 94 S Ct 2963; 41 L Ed 2d 935 (1974).

26. See *Pennsylvania Coal Mining Ass'n* v. *Insurance Dep't., supra.*

27. Section 2029 of the Uniform Trade Practices Act provides the Commissioner of Insurance with a means for legal redress to remedy "an unfair method of competition, or an unfair or deceptive

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Furthermore, a motorist placed in the "Automobile Placement Facility" and classified as an "assigned risk" is subject to a statutory presumption that the rates charged will be higher than the rates for motorists in the open marketplace. MCL 500.3365; MSA 24.13365. In addition, a motorist insured by the "Automobile Placement Facility" is exposed to the procedural and substantive inadequacies of the facility's rate regulatory scheme (which are, essentially, the same as the inadequacies of the rate regulatory scheme for motorists able to obtain insurance from an insurance company in the marketplace). Also, this facility does not provide the same varieties of coverage options offered in the standard market. Finally, there is no statutory provision allowing such a motorist to challenge his assignment to the "Automobile Placement Facility" with its presumptively higher rates.

Therefore, although no-fault insurance may be available, motorists can be refused no-fault insurance or have their insurance cancelled without effective legal redress for challenging refusal or discriminatory cancellation. Furthermore, motorists can be placed into the "Automobile Placement Facility" without an assurance of fair and equitable rates, without an opportunity to obtain the same variety of coverage options, or without a right to challenge such placement.

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act or practice" of a person "engaged in the business of insurance". MCL 500.2029; MSA 24.12029. However, under § 2026 of the Uniform Trade Practices Act, "[u]nfair methods of competition and unfair or deceptive acts or practices in the business of insurance" do not include "isolated incidents", *i. e.,* instances of unfair deceptive acts or practices, etc., affecting a single individual.

We also note that Chapter 32 of the Insurance Code, MCL 500.3204 *et seq.;* MSA 24.13204 *et seq.*, although it provides statutory measures pertaining to automobile liability insurance cancellation, does not protect insureds against potential *discriminatory bases* for insurance cancellation and allows cancellation under conditions not acceptable under a compulsory system.

These deficiencies, in our opinion, most certainly deny due process.[28]

(3) These statutory defects as to the availability of no-fault insurance and the scheme for regulating no-fault insurance rates illustrate the inadequacies of the present statutory system of compulsory insurance but do not define what process is "due".

We therefore feel it necessary to identify the concerns which must be addressed in any new system for rate-regulation and "availability", although "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation". *Cafeteria & Restaurant Workers Union, Local 473* v *McElroy*, 367 US 886, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961).

In determining what process is "due" we consider:

> "* * * First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).

28. In a Report to the Governor on *Essential Insurance in Michigan, supra*, the Commissioner of Insurance states, p. 35:

> "* * * the rate regulation statutes completely ignore underwriting standards and effectively ignore cancellation decisions. Yet we know that those decisions are equally as critical to competitive and fair rates as are pricing decisions. People underwritten against or cancelled may be forced to pay much higher rates in a 'market of last resort.' "

The Commissioner opines, p. 11:

> "Many have been shunted into the residual market because of the application of arbitrary and capricious underwriting and cancellation decisions."

Our conclusion that the No-Fault Act's present rate-making scheme and mechanisms for availability are constitutionally deficient echoes the belief of the Commissioner in his letter to the Governor p. i:

> "[T]he present system of regulation and the mechanisms for guaranteeing availability are seriously deficient."

We are concerned that a person's interest in the registration and operation of a motor vehicle may be effectively suspended by the legislative requirement that registrants and operators of motor vehicles purchase no-fault insurance as a condition to the operation of a motor vehicle if no-fault insurance is not made available on a fair and equitable basis.

The current procedures of the Commissioner of Insurance for the promulgation of rates by insurance companies do not provide sufficient assurance that rates and rate-making factors will be substantially justified. Absent adequate procedures, there is a danger that persons similarly situated will ultimately be treated differently with respect to their recognized interest in registering and operating a motor vehicle. See Davis, Administrative Law of the Seventies, § 6.13.

At the same time, we recognize the insurance companies' need for prompt adjustment of rates which provide adequate capitalization and the state's desire to minimize its administrative burden. We are also concerned with the availability of insurance. Individuals must have the knowledge necessary to protect themselves against erroneous or discriminatory underwriting and rate-making decisions. See *Fuentes* v. *Shevin*, 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972). There must be available adequate means of redress for such errors and discrimination. See *Dixon* v *Love*, 431 US 105; 97 S Ct 1723; 52 L Ed 2d 172 (1977). There must also be available adequate means of redress for insurance refusal, discriminatory insurance cancellation, or assignment to the "Automobile Placement Facility" with its presumptively higher rates.

These objectives can be achieved and the procedures harmonized consistent with the due process clause in different ways.

At a minimum, this Court holds that no-fault insurance does not satisfy constitutional due process unless:[29]

29. We emphasize that the following are *minimally* required to satisfy due process. The Legislature can, in its wisdom, choose other enforcement mechanisms assuring adherence to the above principles.

1. The Legislature and/or the Commissioner of Insurance (pursuant to his present rule-making authority, MCL 500.2484; MSA 24.12484), give substantial meaning to the statutory standards "Rates shall not be excessive, inadequate or unfairly discriminatory". See MCL 500.2403; MSA 24.12403; MCL 500.3340; MSA 24.13340.[30]

2. A filed rate, or a rate determined on administrative or judicial review, provides and sets forth:

   a) premiums reasonable to insured and insurer for the specific insurance coverage without regard to factors assertedly warranting differences in premiums among those insured;

   b) the factors which properly may be considered by the insurer in differentiating premiums among those insured; and

   c) the amount of differential appropriate for each such factor.

3. Such information for each insurer[31] is publicized in such a manner that every person affected can readily ascertain the factors and amounts of differentials applicable to him and calculate the premium the insurer may charge.

4. Every motorist has the opportunity to obtain a prompt and effective administrative review of an insurer's calculation of the factors, differentials and premium applicable to him and a prompt and effective administrative review of the basis for the refusal or cancellation of insurance.[32]

30. See Davis, *Administrative Law of the Seventies*, § 6.13.

31. The Legislature, or Commissioner of Insurance (if so authorized), might, as in other states, establish factors, differentials or premiums uniformly applicable to all insurers. This "minimal" requirement proceeds on the assumption that this will not be required or authorized by the Legislature and that, as now, factors, differentials and premiums may be established based upon the insurer's separate experience.

(4) Our holding the No-Fault Act's "compulsory insurance requirement" unconstitutional because of the inadequacies that exist in the present statutory system for making no-fault insurance available at fair and reasonable rates raises crucial jurisprudential and social considerations.

We are deeply aware that our holding not only directly affects the problems of motorists and the insurance business in this state, but that it also substantially affects our entire system of civil justice.

We also assume that, because of our otherwise constitutional approval of the general statutory schemata under the No-Fault Act (*e. g.*, the personal injury protection insurance and property damage protection insurance schemata), the Legislature and the Commissioner of Insurance will seek to remedy the constitutional deficiencies articulated *supra*.

We therefore believe it best, for purposes of the general jurisprudence, the general welfare of the public, and the administration of justice in our state to hold the "compulsory insurance requirement" of the No-Fault Act unconstitutional (for the reasons araiculated *supra*) *effective as of 18 months from the issuance of this opinion*.[33]

32. The Legislature can, of course, choose to prohibit an individual insurer's refusal or cancellation of no-fault insurance by requiring that an insurer establish a system of equitable categories for all 'high risk' persons (for which the insurer can receive some form of legislative protection).

33. See *Robinson* v *Cahill*, 62 NJ 473; 303 A2d 273 (1973), *cert den* 414 US 976 (1973). In *Robinson*, the New Jersey Supreme Court held that state's education financing scheme unconstitutionally violated equal protection. The Court, in its order, declared:

> "The present system being unconstitutional, we come to the subject of remedies. We agree with the trial court that relief must be prospective. The judiciary cannot unravel the fiscal skein. Obligations incurred must not be impaired. And since government must go on, and some period of time will be needed

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At an appropriate time before 18 months from the issuance of this opinion, we will re-examine the constitutional status of the No-Fault Act in terms of remedying the present due process deficiencies. Any party or person wishing to file briefs or be heard shall make timely inquiry of the Clerk as to the proper procedure.[34] This Court will take whatever action appears appropriate at that time.

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to establish another statutory system, obligations hereafter incurred pursuant to existing statutes will be valid in accordance with the terms of the statutes. In other respects we desire the further views of the parties as to the content of the judgment, including argument as to whether the judiciary may, as the trial court did with respect to the 'minimum support aid' and the save-harmless provision of the 1970 Act, 118 NJ Super [223] at 280-281 [287 A2d 187 (1972)], order that moneys appropriated by the Legislature to implement the 1970 Act shall be distributed upon terms other than the legislated ones. A short date for argument will be fixed." 62 NJ 473, 520-521.

Subsequent to this, the Court issued a per curiam opinion referring to the statement in its opinion that it "desired the further views of the parties as to the content of the judgment." This opinion, essentially identical in substance to our holding, stated, 63 NJ 196, 198; 306 A2d 65 (1973):

"We have had the benefit of further argument. It is our view that the Court should not disturb the statutory scheme unless the Legislature fails to enact, by December 31, 1974, legislation compatible with our decision in this case and effective no later than July 1, 1975. We withhold ruling upon the question whether, if such legislation is not so adopted, the Court may order the distribution of appropriated moneys toward a constitutional objective notwithstanding the legislative directions.

"We retain jurisdiction. Any party may move for appropriate relief, before or after December 31, 1974, if new circumstances so warrant."

See *Governor* v *State Treasurer (On Rehearing)*, 390 Mich 389, 394-395; 212 NW2d 711 (1973).

34. The Legislature, in whatever manner it deems appropriate, is invited to be represented at this Court's re-examination of the constitutional status of the No-Fault Act.

During the interim period:

1) the Legislature and the Commissioner of Insurance may take whatever action they deem necessary to remedy the due process deficiencies articulated *supra*[35]

2) §§ 3101(1) and 3101(4) of the No-Fault Act will remain in effect, *i.e.*, motorists will still be required to obtain no-fault insurance as a condition precedent to the registration and operation of a motor vehicle;

3) the No-Fault Act's constitutionally valid provisions, as decided in this opinion and subsequent opinions, will remain in effect.

Until there is legislative or agency response to the due process deficiencies articulated *supra*, the Commissioner of Insurance shall actively enforce the present regulatory scheme in the spirit of our opinion in order to assure the availability of no-fault insurance at fair and equitable rates during this period.

We also add that all rights accrued by individuals against their insurers or against the "Automobile Placement Facility" until the order in this case is entered remain valid.

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35. See *Robinson* v. *Cahill* and fn 33, *supra*.

See also, Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471, 559, fn 268 (1970). Professor Sax writes that "In the ideal world legislatures are the most representative and responsive public agencies; and to the extent that judicial intervention moves legislatures toward that ideal, the citizenry is well served." He then perceptively notes, and we agree:

"It should be emphasized that the judicial function is properly invoked principally to deal with issues which, while very important, tend to be made at low-visibility levels, even though they may be endorsed by very highly placed officials. *Conversely, when there is high public visibility on an issue, when it is dealt with as a central matter of state or national policy, and when account has been taken of open and widespread public opinion from all quarters, the judiciary does not ordinarily have a role to play as a perfector of the political process. In such cases, the charge that judicial intervention would amount to displacement of the considered judgment of co-equal branches of the government has merit.*" (Emphasis added.)

IV.

Although we have held the No-Fault Act's "compulsory insurance requirement" unconstitutional because of insufficient due process protections, effective as of 18 months from the issuance of this opinion, we again emphasize our concurrent holding that "[d]uring the interim period * * * the No-Fault Act's constitutionally valid provisions, as decided in this opinion and subsequent opinions, will remain in effect." Accordingly, we now address the remaining issues in this case properly before us.

All the remaining issues involve due process and equal protection challenges to various statutory schemata of the No-Fault Act. At bottom, these issues are directed at the question of whether the Legislature constitutionally exercised its police power in enacting a particular statutory scheme. Because the constitutional framework employed and discussed with respect to the "compulsory insurance requirement" (*i.e.*, the facial due process sufficiency of the protections provided in the act and other sections of the Insurance Code for available no-fault insurance at fair and equitable rates) was, conceptually, of a different constitutional nature, it is necessary that we discuss the applicable due process and equal protection tests for these remaining issues.

The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.[36] See *Michigan Canners* v. *Agricultural Board*, 397 Mich 337, 343-344, 245 NW2d 1 (1976).

36. Plaintiffs and cross-plaintiffs State Farm Mutual and Allstate contend that this Court should apply a more rigorous due process test in deciding those issues involving the abolition of a common-law cause of action in tort. They cite, as authority, speculative dicta in *New York C R Co* v *White*, 243 US 188, 201; 37 S Ct 247; 61 L Ed 667 (1917) and *Pinnick* v *Cleary*, 360 Mass 1, 15; 271 NE2d 592, 602 (1971). They ask that we require the Legislature to afford an "adequate substitute remedy" before abolishing a common-law cause of action in tort.

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The test to determine whether a statute enacted pursuant to the police power comports with equal protection is, essentially, the same. As the United States Supreme Court declared in *United States Dep't. of Agriculture* v. *Moreno*, 413 US 528, 533; 93 S Ct 2821; 37 L Ed 2d 782 (1973):

> "Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." (Citations omitted.)[37]

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We disagree. The "adequate substitute" test is not required by either the United States or Michigan Constitutions. The United States Supreme Court, in *Silver* v. *Silver*, 280 US 117, 122; 50 S Ct 57; 74 L Ed 221 (1929), a case decided after *New York C R Co* v *White*, flatly declared: "[t]he constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." In *Pinnick*, the Massachusetts Supreme Court, in choosing to apply a "reasonable and adequate substitute test", correctly recognized that the test was "not constitutionally required". 360 Mass 1, 15-16. Other state courts have also forthrightly rejected the test as constitutionally required. See especially, *Montgomery* v. *Daniels*, 38 NY2d 41, 56; 340 NE2d 444, 453 (1975); and *Jones* v. *State Board of Medicine*, 97 Idaho 859, 869; 555 P2d 399, 409 (1976).

Our Constitution does not recognize a vested right in the continuance of existing remedies for injuries not yet suffered. Article 3, section 7 of our Constitution states that "the common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7. As this Court stated in *Mackin* v. *Detroit-Timkin Axle Co*, 187 Mich 8, 13; 153 NW 49 (1915): "Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. Common and statute laws only remain in force until altered or repealed." See, also, *Myers* v *Genesee County Auditor*, 375 Mich 1, 7-8, 133 NW2d 190 (1965) (opinion by O'Hara, J.).

This is not to suggest that the Legislature may arbitrarily abolish a common-law remedy. Leaving seriously injured persons without any remedy may violate concepts of fundamental fairness and justice which are part of the fabric of constitutional government.

37. Plaintiffs contend that this Court should apply the "substantial-relation-to-the-object" test advanced in *Manistee Bank & Trust Co.* v. *McGowan*, 394 Mich 655; 232 NW2d 636 (1975).

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In the application of these tests, it is axiomatic that the challenged legislative judgment is accorded a presumption of constitutionality. See *Michigan Canners* v. *Agricultural Board, supra,* 343-344. What this "presumption of contitutionality" means, in terms of challenged police power legislation, is that in the face of a due process or equal protection challenge, "where the legislative judgment is drawn in question", a court's inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it". *United States* v *Carolene Products Co,* 304 US 144, 154; 58 S Ct 778; 82 L Ed 1234 (1938). A corollary to this rule is that where the legislative judgment *is supported by "any state of facts either known or which could reasonably be assumed",* although such facts may be "debatable", the legislative judgment must be accepted. *Carolene Products Co* v *Thomson,* 276 Mich 172, 178; 267 NW 608 (1936).[38]

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In *Manistee,* we stated this test is applicable in those cases in which "the challenged statute carves out a discrete exception to a general rule *and the statutory exception is no longer experimental*" (emphasis added). 394 Mich 655, 671. The No-Fault Act, not even in effect for five years at the time of this writing, cannot be sensibly characterized as legislation "no longer experimental" in the same way in which the 45-year-old guest statute at issue in *Manistee Bank & Trust Co.* unquestionably was.

Plaintiffs also contend that this Court should review this legislation with "strict scrutiny" under the equal protection clauses of the Michigan and United States Constitutions because a "fundamental interest", the right to travel, is involved. We agree with the trial court and the Court of Appeals that under the equal protection clause a person's interest in operating an automobile is not fundamental. *Shavers* v *Attorney General,* 65 Mich App 355, 364; 237 NW2d 325 (1975). The right to travel protects movement in the sense of migration, not the individual's choice of a particular means of transportation. See *Memorial Hospital* v *Maricopa County,* 415 US 250, 255-259; 94 S Ct 1076; 39 L Ed 2d 306 (1974).

38. See *Ferguson* v *Skrupa,* 372 US 726, 730-731, 83 S Ct 1028; 10 L Ed 2d 93 (1963), where the United States Supreme Court stated:

> "[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass

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In accord with this axiomatic rule and its corollary a court may uphold the constitutionality of police power legislative judgments in the face of due process or equal protection challenge by taking judicial notice of indisputable, generally known or easily ascertainable facts.[39] And, because the "presumption of constitutionality" is a rebuttable presumption, a party challenging the legislative judgment may attack its constitutionality in terms of purely legal arguments (if the legislative judgment is so arbitrary and irrational as to render the legislation unconstitutional on its face)[40] or may show, by bringing to the court's attention facts which the court can judicially notice, that the legislative judgment is without rational basis.[41]

There are, however, instances in which police power legislative judgments cannot be affirmed or rejected on the basis of purely legal arguments or indisputable, generally known or easily ascertainable facts which can be judicially noticed. In such instances, the facts upon which the existence of a rational basis for the legislative judgment are predicated "may properly be made the subject of judicial inquiry" (*United States* v *Carolene Products, supra,* 153). Thus, a court may require a trial so that it may establish adequate findings of facts to determine whether,

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> laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' * * * We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'." (Citations omitted.)

39. See *Borden's Farm Products Co, Inc.* v. *Baldwin,* 293 US 194; 55 S Ct 187, 79 L. Ed. 281 (1934). For a recent example of this Court's exercise of this principle, see *People* v *Poucher,* 398 Mich 316; 247 NW2d 798 (1976).

40. See *Borden's Co* v *Baldwin,* fn 39, *supra; Pinnick* v *Cleary, supra,* 360 Mass 36; 271 NE2d 614 (Tauro, C. J., concurring).

41. See fn. 39, *supra.*

on the one hand, plaintiffs have shown facts which reveal that the legislative judgment is without rational basis, or, on the other hand, whether there is *any* reasonable state of facts on the record which can be produced in support of the legislative judgment.[42]

Such an approach is particularly necessary when the challenged police power legislation is important, complicated, novel or experimental legislation. *Borden's Farm Products Co, Inc* v *Baldwin*, 293 US 194, 204, 210, 212; 55 S Ct 187; 79 L Ed 281 (1934). See also *Pinnick* v. *Cleary, supra*, 34-37 (Tauro, C. J., concurring). As Chief Justice Hughes declared, writing for a unanimous United States Supreme Court in *Borden's Co* v *Baldwin, supra:*

> "[W]here the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. *With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without edequate factual support.*" (Emphasis added.) 293 US 194, 210.

We believe that the No-Fault Act is substantively analogous in this respect to the legislation challenged in *Borden's Co* v *Baldwin*.[43] The challenged rational bases for the legislative judgments under the act are "predicated" upon complicated statistics and actuarial facts of the motor vehicle insurance

42. See *Note, The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 Harv L Rev 631 (1936); Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 Pa L Rev 637 (1966).

43. At issue in *Borden's Co* v *Baldwin* was the constitutionality of the New York Milk Control Law.

"trade" or business (which have substantial economic consequences). We believe, as did the Supreme Court in *Borden's Co* v *Baldwin*, that the "complexity of problems" inherent in a judicial determination of whether the legislative judgments of the No-Fault Act are constitutional, "makes it the more imperative that the Court in discharging its duty, in sustaining governmental authority within its sphere and in enforcing individual rights, shall not proceed upon false assumptions". 293 US 194, 210-211. Thus, as Justices Stone and Cardozo stated in their concurring memorandum in *Borden's Co* v *Baldwin:*

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." 293 US 194, 213.

This Court implicitly recognized this approach in *Michigan Canners* v *Agricultural Board, supra.* At issue in *Michigan Canners* were "important questions of first impression regarding the constitutionality and construction of the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.;* MSA 12.94(101) *et seq.*". 397 Mich 337, 340. The circuit court, however, dismissed the challenge on (erroneous) jurisdictional grounds. 397 Mich 337, 342, 344-345. This Court declared:

> "As mentioned above, plaintiff has raised important questions regarding the constitutionality and construction of the Agricultural Marketing and Bargaining Act without developing a factual record at trial which would help provide a context in which to consider these questions.
>
> "To resolve these significant issues in such a factual vacuum would be imprudent where it appears that further factual development would substantially contribute to the proper disposition of the case.
>
> "Such is the case here, especially in that *Michigan Canners* has claimed that the Bargaining Act is unconstitutional because it exceeds the police power of the state. This claim in particular requires full development of facts

which might support or undermine the claim that the statute is an invalid exercise of the police power." 397 Mich 337, 342-343.[44]

Therefore, in the face of due process challenges to the legislative judgments of the No-Fault Act which resulted in various statutory schemata, our task is double-edged. First, we must determine from the record before us whether plaintiffs have overcome the presumption of constitutionality by showing facts which reveal that the legislative judgment is without rational basis, or, to the same effect, we must determine from the record whether the challenged legislative judgment is supported by *any* reasonable state of facts justifying its enactment. Second, we must then determine whether the legislative response bears a reasonable relation to this identified objective.

Similarly, our task is double-edged in considering equal protection challenges to the No-Fault Act. First, we must determine from the record before us whether plaintiffs have overcome the presumption of constitutionality by showing facts which reveal that the legislative judgment is without rational basis or, to the same effect, we must determine from the record whether the challenged legislative judgment is supported by *any* reasonable

44. Justice COLEMAN, concurring in this approach, declared:

"Although it is accepted that the concept of police power is somewhat 'elastic in nature', there is a danger here that it be stretched so far as to have no real meaning. Proposed standards such as that which fosters the 'convenience and comfort of the people' or preserves and improves 'social and economic conditions affecting the community at large' could justify almost any imaginable action.

"Remand is proposed because the claim that the statute exceeds the police power 'in particular requires full development of the facts'. I agree with the remand providing that the trial judge develop those facts deemed pertinent, but I would leave discussion of the constitutional question until we have the facts." 397 Mich 337, 351-352.

Therefore, we remanded to the circuit court asking "both parties to contribute to the development of a factual context which will allow us to properly resolve the issue of the constitutionality of the act". 397 Mich 337, 344.

set of facts indicating that the legislative judgment is in the exercise of a legitimate governmental interest. Second, we must then determine whether the challenged statutory classifications which result from the legislative judgment are reasonably related to this legitimate governmental interest.[45]

V.

The second issue before us is whether the No-Fault Act's personal injury protection insurance scheme violates the due process and equal protection clauses of the Michigan and United States Constitutions.

The features of the act's personal injury insurance scheme relevant to the resolution of the due process and equal protection challenges before us are:

1. The owner or registrant of a motor vehicle required to be registered in Michigan must maintain security for payment of benefits under personal injury protection insurance (§ 3101);
2. Tort liability arising from the ownership, maintenance or use within the State of Michigan of a motor vehicle is abolished with respect to accidental bodily injury *except* for non-economic loss "if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement" (§ 3135[1]), intentionally caused harm to persons (§ 3135[2][a]), or damage in excess of the personal injury insurance benefits provided under the act (§ 3135[2][c]). However, tort liability arising from the ownership, maintenance or use within this state of a motor vehicle with respect to bodily injury is not abolished if the operator of the motor vehicle has not complied with the act's

45. This Court does not believe a factual context is necessary to decide the facial due process sufficiency of the act's present rate regulatory scheme because of this issue's purely procedural nature.

mandatory insurance requirements (*i.e.*, if the person is uninsured) (§ 3135[2]);

3. The owner, registrant and operator of an insured vehicle who suffers accidental motor vehicle bodily injury in Michigan or in another state, whether he suffers this injury in his own vehicle or as an occupant of another vehicle or when he is not an occupant of a motor vehicle, is entitled to personal injury protection insurance benefits. The same is true for the "spouse and any relative" of the insured who is "domiciled in the same household" as the insured (§ 3114[1], see § 3110). However, an owner or registrant of a vehicle with respect to which the compulsory requirements of the act are not in effect (*i.e.*, the uninsured Michigan motorist) is not entitled to personal injury protection insurance benefits.

In general, personal injury protection insurance under the act provides:

(a) all medical costs and expenses occasioned by injuries sustained in a motor vehicle accident, including expenses for rehabilitation (see § 3107[a]);

(b) reimbursement up to a maximum of $1,000 a month for loss of income resulting from a motor vehicle accident for a period not exceeding three years. This amount is applied pro rata for shorter periods of work loss. (This limit may be adjusted annually to keep pace with changes in the cost of living.) (§ 3107[b]). Personal injury protection insurance also provides up to $1,000 for funeral and burial expenses (§ 3107[a]);

(c) reimbursement for the cost of replacement of ordinary and necessary services "reasonably incurred", *i.e.*, reimbursement of services the injured person would have performed not for income but for his own personal benefit or the benefit of his household if these services are shown to be "reasonably incurred". Under the act, an injured person may be reimbursed for such services up to a limit of $20 a day for a maximum period of three years. (This limit may be adjusted annually to keep pace with changes in the cost of living.) (§ 3107[b].) The family of the injured person may receive the same reimbursement should the injured person die. (§ 3108.)

(A) *Due Process*

Plaintiffs contend that the No-Fault Act violates due process by partially abolishing the common law remedy in tort for persons injured by negligent motor vehicle tortfeasors.

We disagree.

As noted *supra*, the Legislature need not provide an "adequate substitute" remedy before abolishing a common-law cause of action in tort; *Macklin* v *Detroit-Timkin Axle Co*, 187 Mich 8, 13; 153 NW 49 (1915); *Naudzius* v *Lahr*, 253 Mich 216; 234 NW 581 (1931; *Silver* v *Silver*, 280 US 117; 50 S Ct 57, 74 L Ed 221 (1929). The abolition of a common-law tort remedy is measured by the traditional due process test, namely, whether the legislation bears a reasonable relationship to a permissible legislative objective. See discussion, Part IV, *supra*.

We believe that the abolition of the tort remedy for personal injury resulting from motor vehicle accidents was clearly justified by deficiencies in the tort system.

Testimony and documentary evidence presented at trial support the apparent legislative judgment that the tort system of reparations for automobile accident victims had several operational deficiencies:

1. A high percentage of persons injured in automobile accidents received no reparations under the tort system (to collect damages under this system the injured person must be free of any contributory negligence

and the accident must be caused by a person who is adjuged to be at fault);[46]

2. Minor injuries were over-compensated and serious injuries were under-compensated;[47]
3. Lengthy delays existed under the tort system in compensating those injured in automobile accidents—often in cases where the need for prompt compensation was strongest;[48]
4. The tort system imposed a heavy burden on the state's court system,[49]

46. See Exhibit 17, Russell E. Van Hooser, Commissioner of Insurance, *Statement on Automobile Insurance* (1974), and Conard, Morgan, Pratt, Voltz, & Bombaugh, *Automobile Accident Costs & Payments* (Ann Arbor: The University of Michigan Press, 1964) to the effect that "only 37% of persons injured in automobile accidents in Michigan received tort recovery".

47. The trial court summarized the exhibit provided by Professor W. James MacGinnitie of the University of Michigan School of Business Administration as follows:

> "His testimony showed that for cases of serious injuries under the tort system, 56.7% of the persons received no compensation; 11.1% received less than 50% of the economic loss, and 10.9% received 50% to 100% of economic loss. The balance of 20.3% received anywhere from 100% to 400% of economic loss."

See, also, Department of Transportation, *Motor Vehicle Crash Losses and their Compensation,* which reports that "for fatally and seriously injured persons with economic losses of $10,000 or more the median aggregate compensation received from all sources was only 35% of their total economic losses". Joint Appendix, p. 2674a, and Van Hooser, *Statement on Automobile Insurance, supra.*

48. See testimony of Chief Deputy Insurance Commissioner Robert Rowe and Department of Transportation study, *Motor Vehicle Crash Losses,* to the effect that there is "an average delay of 16 months for fatalities and serious injuries". Joint Appendix, p. 2675a.

49. See Department of Transportation study, *Automobile Accident Litigation,* Joint Appendix, p. 2680a.

5. The tort liability system discriminated, in terms of recovery, against the uneducated and those persons on a low income scale.[50]

The legislative response, the enactment of the no-fault personal injury protection scheme, reasonably relates to the purpose of correcting these evils. These provisions provide, *inter alia,* for payment without regard to fault within 30 days of claim for all reasonable medical and rehabilitation expenses, for wage loss and replacement services for a period of three years, for survivor's loss of support and services for three years. Such payments may substantially compensate all personal injury victims of motor vehicle accidents for economic loss, including the victims of motor vehicle accidents, who were, under the tort system, uncompensated or undercompensated for their economic losses. Prompt payment provided for under the act may remedy the delays under the tort system. By partially abolishing tort liability to those who suffer personal injuries as a result of motor vehicle accidents, the act may lessen the number of motor vehicle personal injury tort suits in the courts. The prompt availability of compensation for economic losses may relieve the uneducated or those with lower income from the pressure—"legal" or economic—to settle serious claims prematurely and for less than an equitable amount.

50. The trial court found:

> "[t]he percentage of recovery by level of family income increased as the family income increased, and also increased as the level of education increased. For example, those with a family income under $5,000 recovered 38% of their economic loss. Those with family incomes of $5,000 to $9,999 recovered 52% of their economic loss, and those with income over $10,000 recovered 61% of their economic loss. By the same token, those who had only a grade school education recovered 24% of their economic loss. Those with a high school education recovered 53% of their economic loss, and those who had some college training recovered 70% of their economic loss."

See, also testimony of Dean Lindsay Cowen of Case Western Reserve Law School, Chairman of the Commission of the National Conference of Uniform State Laws.

For these reasons, we hold that the personal injury protection insurance scheme under the No-Fault Act, in partially abolishing the common-law remedy in tort for persons injured by negligent motor vehicle tortfeasors, does not violate the due process clauses of the Michigan and United States Constitutions.

(B) *Equal Protection*

Plaintiffs contend that the No-Fault Act, by partially abolishing the common-law remedy in tort for persons injured by negligent motor vehicle tortfeasors, violates equal protection by creating two impermissible statutory classifications: (1) motor vehicle tortfeasors and their victims and all other tortfeasors and their victims; (2) victims of insured motor vehicle tortfeasors and victims of uninsured motor vehicle tortfeasors.

We disagree.

The treatment of motor vehicle tortfeasors differently from all other tortfeasors does not violate the traditional test for equal protection. Exhibits were introduced at trial to show that motor vehicle accidents have consistently and by a wide margin been the principal cause of accidental injury and death in Michigan. The State Police reported that in 1973 approximately 360,000 motor vehicle accidents occurred, resulting in 2,215 fatalities. The legislative judgment to limit its experiment in personal injury reparation to victims of accidents involving motor vehicles is justified by the predictably frequent and serious injury to persons and property resulting from the use of motor vehicles. See *Williamson* v *Lee Optical Co,* 348 US 483, 489; 75 S Ct 461; 99 L Ed 2d 563 (1955).

Second, the creation of two classes of motor vehicle accident victims—victims of an insured motor vehicle tortfeasor who may not sue below the threshold and victims of uninsured motor vehicle tortfeasors who may sue—does not violate equal protection. This classification, along with penalties imposed by § 3102(2) may serve as an incentive for compliance with the compulsory insurance provision because an uninsured motorist may

be liable in tort for all injury suffered by the victim. *McKendrick* v. *Petrucci,* 71 Mich App 200, 207; 247 NW2d 349 (1976).[51] It is significant in this regard that the Assigned Claims Facility is required to pay benefits to persons who may be injured by uninsured motorists. MCL 500.3171 *et seq.;* MSA 24.13171 *et seq.*

For these reasons, we hold that the No-Fault Act's incidental statutory classification between victims of insured motor vehicle tortfeasors and victims of uninsured motor vehicle tortfeasors does not violate the equal protection clauses of the Michigan and United States Constitutions.

VI.

The third issue before us is whether the No-Fault Act's property damage protection scheme violates the due process and equal protection clauses of the Michigan and United States Constitutions.

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51. The right granted victims of uninsured motorists to maintain an action for damages below the statutory threshold is of marginal value. The argument that it unfairly discriminates against victims of insured motorists to deny them the same below-the-threshold recovery assumes erroneously that the right granted victims of uninsured motorists is of comparable value to the right withheld from the victims of insured motorists who as a group are more likely to be responsible than those who are not insured. It also ignores that victims of insured motorists have, perhaps in part because of the *in terrorem* effect of the various sanctions, including this sanction, to which uninsured motorists are subject, a better source of recovery above the threshold—within and above the required policy limits—than victims of uninsured motorists. The classification reflects a legislative policy which, although it discriminates between victims, does not in our judgment constitute an invidious discrimination offending the equal protection clause.

It is a separate question whether the classification invidiously discriminates among uninsured tortfeasors or between uninsured and insured tortfeasors, a question not raised by the plaintiffs and which we need not now consider. Nor need we consider whether, if the classification so invidiously discriminates, the remedy would be to eliminate the limitation on recovery below the threshold or to make it applicable to all tortfeasors without regard to whether they are or are not insured.

The features of the act's property damage insurance scheme relevant to the resolution of the due process and equal protection challenges before us are:

1. The owner or registrant of a motor vehicle required to be registered in Michigan must maintain security for payment of benefits under property damage protection insurance (§ 3101);
2. Tort liability arising from the ownership, maintenance or use within the State of Michigan of a motor vehicle is abolished with respect to property damage except for intentionally caused damage to property (§ 3135[2]);
3. Tangible ("non-moving") property owned by a third party injured as a result of a motor vehicle accident and motor vehicles parked in such a way as not to cause unreasonable risk of damage are entitled to property damage protection insurance benefits up to $1,000,000 against the insurer of the motor vehicle which inflicted the damage (§§ 3121, 3123[1][a]);

The following damaged property is not entitled to property damage protection benefits: the property of the insured, including the motor vehicle, and tractor attached thereto, or any property of the insured in his motor vehicle (§ 3123[1] subds. [a], [b]). Also, property damage protection benefits are not payable for damage to (1) third-party motor vehicles which are parked in such a way as to cause an unreasonable risk of damage, or (2) non-vehicle property arising from out-of-state motor vehicle accidents (§ 3123).

Because property damage to an insured's own motor vehicle is not covered by property protection insurance benefits, the act requires insurers to offer optional first-party collision insurance to provide an insured reimbursement for such damage if he so chooses (§ 3037).

(A) *Due Process*

Plaintiffs and cross-plaintiffs contend that the No-Fault Act violates due process by abolishing the common-law remedy in tort for persons whose property is damaged by negligent motor vehicle tortfeasors.

We disagree.

Again, in resolving this due process challenge, we apply the traditional due process test, namely whether the legislation bears a reasonable relation to a permissible legislative objective.

The trial court found, and the record tends to support its conclusion, that the weaknesses of the tort system of compensation for personal injuries suffered as a result of motor vehicle accidents[52] did not affect that system's compensation of property damage. Although the switch from property damage liability coverage to collision coverage may yield some increase in the efficiency of payments, it is apparent from a review of the record that the tort system provided relatively prompt, equitable compensation for damage to property resulting from motor vehicle accidents.

The analysis by the trial court and the Court of Appeals suggests that there must be an identifiable evil which the Legislature intends to correct. We do not believe this is constitutionally necessary. The Legislature is as free to experiment with other ways of dealing with a subject in the hope of making a good system better as it is to correct a perceived evil system.

The property damage section seeks to achieve several goals in addition to prompt, equitable and complete compensation.

Testimony at trial established that the Legislature anticipated that the abolition of a tort action for property damage would

52. The trial court stated: "[T]he former system operated at high efficiency in resolving property damage disputes arising from automobile crashes." See Mehr & Eldred, *Should the Automobile Property Damage Liability Insurance System Be Preserved?*, 48 Notre Dame Lawyer 811 (1973), and Exhibits 162, 163, 164, and the testimony of Richard Kinkade, Joint Appendix, p. 1235a.

have at least four major effects ultimately resulting in lower and more equitable premiums.

First, with the shift from liability to collision insurance resulting from the abolition of tort liability, there would be a new emphasis on the value and repairability of the insured's own motor vehicle; rates would be calculated on the basis of repair costs for that vehicle, rather than, as in liability insurance, on the potential damage to a vehicle of unknown value.[53]

Second, an additional anticipated effect of relating premium costs to the insured's car was that this system would create incentives for safer cars.[54]

Third, the abolition of tort liability eliminates the necessity for accident investigations, because a determination of fault is irrelevant to the payment of compensation. The elimination of such investigations, it was hoped, would result in decreased administrative costs and resultant savings on insurance premiums.[55]

53. See testimony of Professor W. James MacGinnitie:

> "* * * [G]reater equity will be achieved in the sense that each individual will be paying a premium related to the size and damageability and characteristics of his own vehicle.
>
> "In the past, he's paid a premium which, in large part, reflected the average of all the other vehicles with which he might be involved in an accident * * *.
>
> "The equity that is achieved thereby is [that] a small car which has a relatively low value, would carry a lower premium for collision as opposed to a large car, high value [which] would carry the relatively larger premium."

See, also, 13 ULA, Civil Procedural and Remedial Laws, Uniform Vehicle Accident Reparations Act, § 5(a)(4), Comment, p. 374, and the testimony of Chief Deputy Insurance Commissioner Robert Rowe, Joint Appendix, p. 486a.

54. See Exhibit 202, New York Insurance Department, *Automobile Insurance—For Whose Benefit?*, pp. 119-121; Exhibit 34, United States Department of Transportation, *Motor Vehicle Crash Losses and Their Compensation in the United States* (March, 1971), pp. 97, 128-129; and the testimony of Professor W. James MacGinnitie, Joint Appendix, p 2557a.

55. See testimony of Professor W. James MacGinnitie and Dean Lindsey Cowen, Joint Appendix, pp 1578a 2072a and Uniform Motor Vehicle Accident Reparations Act, § 5(a)(4), Comment, p 374.

Finally, by shifting from a liability to a no-fault system which emphasizes the risk to be insured, not the exposure to some unknown third party, the Legislature anticipated that group insurance would become feasible. Group insurance has been shown to be far less expensive to administer and more likely to result in lower costs. Furthermore, this potential for group insurance may draw large life and group insurance underwriters into the automobile insurance field, resulting in beneficial competition.[56]

The fact that these effects are not yet evident does not diminish the legitimacy of the goals sought to be achieved or the reasonableness of the means adopted. At this early stage in the functioning of the No-Fault Act these long-term developments cannot yet fully be assessed. Indeed, this litigation itself, with its resulting uncertainty as to the viability of the No-Fault Act, may slow the achievement of the act's goals. Our decision in *Manistee Bank, supra,* is particularly relevant to this aspect of the case: it is precisely because regulation in the economic field often deals with long-term developments that the Court treats such legislation with great deference.

Plaintiffs and cross-plaintiffs emphasize that fault investigations have continued under the No-Fault Act. But that fact is not at this point a relevant consideration.[57] Those investigations may be merely vestigial.

56. See testimony of Professor W. James MacGinnitie, Joint Appendix, pp 2043a-2044a.

57. The trial court and appellee State Farm point to the testimony of Richard Kinkade, witness for and employee of State Farm, who testified that the cost of investigating fault for property damage was 3/10 of 1% of State Farm's earned premiums, $63,215, in 1972. A review of the State Farm report (Exhibit 53) relied on by Kinkade reveals that in 1972 the paid allocated loss adjustment expenses, which includes fault investigations, had substantially greater expenditures for the category of property damage connected with bodily injury ($1,640,284) and bodily injury alone ($1,577,069). It is not clear from the testimony whether the $63,000 figure for property damage reflects those instances where a minimal fault investigation was necessary, nor is it clear what percentage of the

(Footnote continued on next page.)

Similarly, plaintiffs and cross-plaintiffs emphasize the increase in collision premiums resulting from the enactment of No-Fault. Whether or not there has been such an increase and whatever the cause, the important consideration for this Court at this point is to determine whether there existed a permissible legislative objective reasonably related to the statute. We find that the No-Fault Act's property damage protection scheme meets this test and, accordingly, hold the property damage protection scheme does not violate due process.

(B) *Equal Protection*

Plaintiffs and cross-plaintiffs contend that the No-Fault Act violates equal protection by creating the following statutory classifications: (1) damage to vehicular property is not covered by any mandatory insurance under the act, *i.e.*, property damage claims with respect to this kind of property are covered solely under optional first-party collision insurance, while (2) damage to tangible property and properly parked motor vehicles is covered by mandatory third-party (no-fault) property damage insurance up to $1,000,000 required to be carried by the motorist who inflicted the damage.

We disagree.

Again, as in the equal protection challenge to the personal injury section of the No-Fault Act, we apply the traditional equal protection test.

(Footnote continued from preceding page.)
figures for property damage were connected with bodily injury and bodily injury investigations. Nevertheless a review of all the figures indicates that the $63,000 sum was an inaccurate estimate of the total fault investigations connected with property damage accidents. The view that fault investigations are a substantial element in the administrative costs of insurance companies is in accord with the testimony of Dean Cowen, contributor to the Uniform Motor Vehicle Accident Reparations Act, and W. James MacGinnitie, Professor of Actuarial Science and Director of the Master of Actuarial Science program at the University of Michigan. Finally, it should be noted that Mr. Kinkade admitted in his testimony that

(Footnote continued on next page.)

Plaintiffs' and cross-plaintiffs' equal protection complaint is, in essence, that the Legislature has violated equal protection in providing that persons whose vehicular property is damaged as a result of a motor vehicle accident are to be compensated only if they have chosen to purchase collision insurance. While, on the other hand, the Legislature provided that persons whose tangible property or properly parked motor vehicle is damaged as a result of a motor vehicle accident are to be compensated up to $1,000,000 through mandatory third-party (no-fault) property damage insurance required to be carried by the motor vehiclist who inflicted the damage.

In discussing this equal protection challenge to the property damage protection scheme, it is necessary to first logically analyze a basic misconception: no-fault and first-party insurance are misnomers in the context of property damage protection. It is not essential that every aspect of the no-fault scheme provide first-party protection, *i.e.*, recovery by the victim from his own insurer. First-party protection is only one method of assuring prompt, equitable recovery.

Under the property protection scheme, owners of tangible property and properly parked motor vehicles collect from the insurer of the motor vehicle which inflicted the damage. Owners of moving or improperly parked motor vehicles may collect compensation from their own insurers, if they have chosen to self-insure.

The different treatment of moving vehicles and tangible property and properly parked vehicles is related to the second conceptual difficulty relating to the use of fault in a no-fault act. Common sense would indicate, and actuarial studies have shown, that in accidents involving motor vehicles and tangible property, the motor vehicle is usually at fault. Consequently, the act makes

(Footnote continued from preceding page.)
the cost of investigation would be less under no-fault than it was under the tort system. Thus, even if some fault investigation continues under no-fault for certain types of coverage, it will apparently be less intensive or not as common as before.

the motorist strictly liable for the damage he does to tangible property and requires him to purchase insurance for such damage.[58]

The system, however, functions without regard to fault. That is, there is no determination in each accident of who was at fault. Thus, the appellation "no-fault" is a misnomer only if one concentrates on the initial legislative allocation of responsibility. However, if one looks at the operational effect of the act, it remains a system of insurance without fault.

Section 3121 of the No-Fault Act provides that property protection insurance benefits paid under one policy for all damage to tangible property resulting from an accident shall not exceed $1,000,000. This limit does not violate equal protection (nor due process). It appears from the record that the Legislature sought to limit the absolute liability of insurance companies.[59] The choice of a $1,000,000 limit was justified from an actuarial standpoint.[60]

For these reasons we hold that the No-Fault Act's classification of persons whose vehicular property is damaged as a result of a motor vehicle accident (who are compensated if they have chosen to purchase first-party collision insurance), and those persons whose tangible property or properly parked motor vehicles are damaged (who are compensated up to $1,000,000 through mandatory third-party, no-fault property damage insurance required to be carried by the motorist who inflicted the damage), does not violate the equal protection clauses of the Michigan and United States Constitutions.

58. It is possible that a motorist's insurer will be liable to the owners of stray animals, trains or other non-stationary tangible property which may occasion the damage. The equal protection clause does not, in this context, require that statutory classifications be drawn with great precision. *New Orleans* v. *Dukes*, 427 US 297, 303-304; 96 S Ct 2513; 49 L Ed 2d 511 (1976).

59. See testimony of former Commissioner of Insurance Van Hooser, Joint Appendix, p 2393a.

60. See testimony of Jerry Hillhouse, which revealed that the difference in providing coverage with a $10,000 limit or a $1,000,000 limit was insignificant.

VII.

The fourth issue before us is whether § 3101(2) of the No-Fault Act, in excluding two-wheel motor vehicles from coverage under the act, violates the equal protection clauses of the Michigan and United States Constitutions.

Section 3101(2) of the No-Fault Act provides:

> "(2) 'Motor vehicle' as used in this chapter, except for section 3103, means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power *which has more than 2 wheels.*" (Emphasis added.) MCLA 500.3101(2); MSA 24.13101(2), as amended by 1975 PA 329.

The thrust of plaintiffs' complaint is that the No-Fault Act, by limiting coverage to those vehicles with "more than 2 wheels" violates equal protection because it impermissibly treats owners of two-wheel vehicles (*i.e.*, motorcycle owners) differently from owners of vehicles with more than two wheels.

We disagree.

The actuarial data in the record tends to show that motorcycles are rarely at fault in motor vehicle accidents.[61] Also, there was extensive testimony to the effect that in accidents involving motorcycles the drivers and passengers of motorcycles are killed or severely injured at a rate twice exceeding that of those involved in automobile accidents. Thus the inclusion of motorcycles in a no-fault system would result in insurance premiums so high as to preclude most motorcyclists from purchasing insurance.[62] We believe these are, for purposes of satisfying equal

61. See testimony of Robert Rowe, Chief Deputy Insurance Commissioner, Joint Appendix, p 364a.

62. See, especially, testimony of Professor James L. Chastain, Professor of Insurance and Director of the Insurance Studies Center at Drake University, Joint Appendix, pp 170a, 1697a-1698a. To the same effect, see Chief Deputy Insurance Commissioner Robert Rowe's testimony, Joint Appendix, pp 365a-366a, 1857a. See, also,

(Footnote continued on next page.)

protection, legitimate governmental interests. The exclusion of motorcycles from coverage under the No-Fault Act is, quite evidently, reasonably related to these legitimate interests.

We therefore hold that § 3101(2) of the No-Fault Act, in excluding two-wheel vehicles from coverage under the act, does not violate equal protection.[63]

VIII.

The fifth issue before us is whether the No-Fault Act's statutory scheme with respect to work-loss reimbursement and reimbursement for replacement services, § 3107, violates the equal protection clauses of the Michigan and United States Constitutions.

The thrust of plaintiffs' constitutional complaint is § 3107 violates equal protection: (A) because it invidiously discriminates between workers in the home and workers outside the home in terms of maximum benefits payable in case of injury; and (B) because it creates an arbitrary statutory classification by restricting recovery for injuries to those employed in the home to expenses "reasonably incurred" for replacement services.

The trial court held that (A) "the classification * * * between those who work for compensation and those who do not work for compensation inside the house is [not] so invidious as to

(Footnote continued from preceding page.)
Exhibit 182, Tab 1, *The Extent of Bodily Injury to Motorcycle Riders* (1973), *Summary*, pp 4-5, a study performed by the Insurance Studies Center of Drake University.

63. In so holding, we agree with the Court of Appeals that:

> "In our delicate task of constitutional review we should not deprive the Legislature of its ability *to consider the economic aspects* when deciding how far to extend its reform. *Dandridge* v *Williams* 397 US 471; 90 S Ct 1153; 25 L Ed 2d 491 (1970)." (Emphasis added.) 65 Mich App 355, 368.

See also, *Gauthier* v. *Campbell, Wyant & Cannon Foundry Co*, 360 Mich 510; 104 NW2d 182 (1960).

strike it down under the Equal Protection Clause"; (B) "that portion of § 3107(b) requiring that the cost of replacement services must be incurred and subsequently reimbursed is unconstitutional as violative of the Equal Protection Clauses of both the Fourteenth Amendment and the Michigan Constitution". The Court of Appeals did not consider this issue on the merits.

At the threshold we observe that the trial court, in deciding this twofold issue, did not hear testimony. Rather, the court based its decision on "stipulations of fact * * * entered into at the pretrial conference".[64]

In Part IV, *supra*, we ruled that as a matter of constitutional policy, in constitutional challenges to the legislative judgments under the No-Fault Act, this Court requires, at a minimum, that evidence be produced at trial to provide an adequate factual context which might either support or undermine the claim *that the legislative judgment in question* is an invalid exercise of the police power.

Although the trial court did make its decision on the basis of the noted "Stipulations of Facts," we do not feel these stipulations provide an adequate factual context in which we can decide the difficult equal protection issues raised regarding § 3107. For example, the stipulation that "there are times when a person working within a home performs services that are equal to the services of those working outside the home, and who are not compensated to the same extent as those working outside the home" does not indicate whether this happens 90%

64. "It was * * * stipulated that there are times when a person working within the home performs services equal to the services of those working outside the home, and are not compensated to the same extent as those working outside the home. It was further agreed that there are economic and/or pecuniary losses in the death or injury of a person exceeding the amount allowed under the statute for recovery on a no-fault basis. And it was also stipulated that there is at least one person in the State of Michigan who would be unable to get household help to assist that person, without paying daily for such help and who does not have the money to make such daily cash payments."

or 10% of the time. This is a factual determination which could, obviously, present an important consideration. And, the stipulation that "there is at least one person in the State of Michigan who would be unable to [obtain such services on credit] and who does not have the [cash to pay for them]" gives rise to the response, "De minimis non curat lex" ("The law is not based on minimal considerations").

Therefore, we deem it necessary to remand to the trial court so that evidence relevant to the constitutionality of this two-fold issue may be received by that court and constitutionally adjudged in accord with the "traditional" equal protection test articulated in Part IV, *supra*.

We retain jurisdiction as to this issue.

IX.

The sixth issue before us is whether the No-Fault Act's statutory schemata with respect to nonresident, out-of-state motorists, § 3102(1), which require nonresident motorists to maintain no-fault insurance when they are in Michigan "an aggregate of more than 30 days in any calendar year"; and § 3113, read *inter alia* with § 3135(2), which pertains to transient nonresident motorists, violate the due process and equal protection clauses of the Michigan and United States Constitutions.

The trial court held:

> "The Court finds § 3102(1) not violative of either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, or those of the Michigan Constitution. The difference in the treatment of out-of-state motorists in Michigan an aggregate of 30 days in any one year is reasonably related to the essential purposes of the act and is not arbitrary and discriminatory. No invidiously discriminatory classification is established."

The trial court also held "the provisions of § 3113(c) denying a nonresident transient recovery of personal protection insurance,

and also depriving such transient of tort recovery below the threshold, is invalid". The court reasoned that "[the] disparate treatment of resident and nonresident motorists, and their passengers, violates the due process and equal protection standards discussed earlier in this opinion". The court then stated, correctly, that "*[t]here was no evidence offered that such disparate treatment was reasonably related to any proper legislative purpose, nor was any evidence offered to justify the classification*" (empahsis added).

In the lengthy and extraordinary trial in this case, neither plaintiffs nor defendants developed an adequate factual record with respect to the statutory schemata pertaining to nonresident motorists. We cannot, as a matter of policy, allow the disposition of these constitutional challenges to succeed or fail on that basis.

Therefore, we remand to the trial court so that evidence relevant to the constitutionality of the above schemata may be received by that court and constitutionally adjudged in accord with the "traditional" due process and equal protection tests articulated in Part IV, *supra*.[65]

We retain jurisdiction as to this issue.[66]

Conclusion

The Court of Appeals and the trial court are affirmed in part and reversed in part as indicated by our holdings in this opinion's individual parts.

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65. We wish to bring to the attention of the trial court the fact that an inconsistency exists between the requirement that a nonresident obtain no-fault insurance when present in Michigan for "an aggregate of more than 30 days in any calendar year" (§ 3102[2]), and the requirement that persons operating a "pleasure" vehicle in Michigan "for a period exceeding 90 days" register their vehicles in this state (MCLA 257.243[c]; MSA 9.1943[c]).

66. With respect to the issues remanded (see discussion, Part VIII and this part), the trial court shall proceed on the premise that the specific statutory schemata involved are severable and will not be revised by the Legislature.

If the Legislature sees fit to revise either or both schemata, the trial court can then dismiss the suit as to these issues as moot.

An appropriate order reflecting the constitutional status of the No-Fault Act will enter 18 months from the issuance of this opinion. GCR 1963, 866.3(b).[67]

No costs, a public question being involved.

KAVANAGH, C. J. and LEVIN and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

RYAN, J. (concurring in part, dissenting in part). I dissent from the judgment of my colleagues in holding unconstitutional the compulsory insurance section, 3101(1), of 1972 PA 294, known hereafter as the Act or the No-Fault Act. At this juncture I would uphold the constitutionality of the above provision as well as the other challenged provisions of the Act.

For succinctness and ease of analysis, my opinion is divided into sections to correspond with the respective sections of the majority opinion.

PART I. INTRODUCTION

I concur with the majority opinion.

PART II. STANDING

On month prior to the date 1972 PA 294 became effective,[1] the initial plaintiffs brought an action challenging the constitutionality of the Act, while asking for declaratory and injunctive relief. Subsequently, the pleadings were amended and parties were added in an effort to better arrange a more exhaustive constitutional challenge. Plaintiffs claimed standing pursuant to GCR 1963, 201.2(3) or, alternatively, GCR 1963, 521.1.

GCR 1963, 201.2(3) is designed to permit five or more residents of this state who own property assessed for direct taxation by the county where they reside to bring an action to

67. Amended effective January 23, 1978, 402 Mich cxlviii.

1. Plaintiffs filed a complaint for declaratory and injunctive relief on August 28, 1973. The No-Fault Act became effective October 1, 1973.

prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto. I agree with the majority conclusion that GCR 1963, 201.2(3) does not contemplate the expenditure of state funds incidental to the operation of a regulatory scheme. Because the state funds required to be expended under the No-Fault Act are merely those costs incidental to the implementation and enforcement of the Act, the plaintiffs do not have standing to challenge the Act's constitutionality under that rule.

In the alternative, plaintiffs seek declaratory judgment pursuant to GCR 1963, 521.1 which provides:

> "In a case of *actual controversy* within its jurisdiction, any circuit court of this state may declare the rights and other legal relations of any interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." (Emphasis added.)

Before relief can be granted under this rule, plaintiffs must allege and prove an "actual justiciable controversy". "Actual controversy" encompasses something more than simply the plaintiffs' "need to know" in order to guide their future conduct.

In addition, "actual controversy" connotes the pursuance of an honest and actual antagonistic assertion of right by one party against another. A noncollusive adversary proceeding, as distinguished from a contrived friendly lawsuit, is critical, both pragmatically and constitutionally, to the proper performance of the judicial function. Outside of the constitutional provision for advisory opinions, Const 1963, art 3, § 8, this Court limits its resolution of controversies to instances where the stakes of the disputants are committed and the issues developed in adversary proceedings upon trial. *Request for Advisory Opinion on the Constitutionality of 1977 PA 108*, 402 Mich 83; 260 NW2d 436 (1977).

Despite the manifestly contrived nature of the instant action, I would allow plaintiffs standing under GCR 1963, 521.1

because of the compulsory nature of the no-fault scheme. Resident plaintiffs who own and operate automobiles are compelled under threat of civil and criminal sanctions to purchase the no-fault insurance. The pleadings allege that various parties are financially unable to buy no-fault insurance coverage and are therefore subject to those sanctions. We need not hypothecate future events in determining that some of the plaintiffs in this very limited respect are factually in a position antagonistic or adverse to the named state officials whose duty it is to implement the compulsory coverage provisions.

Although "actual controversy" arises solely out of the compulsory coverage provisions, plaintiffs also have standing to challenge other provisions in the Act because of their specific interest in those provisions and because of the allegedly integrated nature of the scheme. Accordingly, in an effort to prove 1972 PA 294 constitutionally infirm, the plaintiffs have the requisite standing to raise the issues addressed in the majority opinion.

Part III. Compulsory Insurance

The first substantive issue addressed in the majority opinion is whether § 3101 of the No-Fault Act, which requires owners or registrants of motor vehicles to maintain compulsory personal injury protection insurance, property damage insurance and residual liability insurance, is constitutional.[2]

Presumably there are a number of theories upon which a challenger might fashion an attack upon the constitutionality of

2. "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle." MCLA 500.3101(1); MSA 24.13101(1).

The majority has erroneously framed the issue in terms of registrants and *operators*. In actuality, the Act mandates only owners or registrants to insure their motor vehicles. Individuals are not required to provide no-fault security by virtue of being the operators of motor vehicles.

§ 3101. It might be claimed that the statute as applied violates equal protection guarantees of the state and Federal Constitutions, denies due process as applied, or simply is an arbitrary or unreasonable statutory mandate. There may be other bases for challenge as well. Whatever the theory of attack, however, and no matter what specific claims a party might make in a judicial challenge to the constitutionality of the provision, one fundamental principle of orderly appellate review should govern: A party wishing to make a claim of unconstitutionality must raise it on appeal before the court of appellate review. There are a number of reasons for such a rule including, of course, the fundamental proposition that an appellate court of final and discretionary review does not, in the proper performance of its function, conjure up issues of interest or even of great importance which the litigants have not raised or asked the court to decide.

The majority ignores this elemental precept of the appellate function and, acknowledging that the plaintiffs did not expressly raise the issue on appeal, "feel compelled to address it because of its basic, threshold importance to any decision we might render as to the No-Fault Act's constitutionality".[3] I cannot acquiesce in legitimatizing such an approach to the appellate function. It is just that sort of "this ticket for this train for this day only" ad hoc rule for appellate review which has invited the criticism that this Court is often long on policy and short on judicial restraint.

It is manifest that the No-Fault Act, currently in its experimental stages, is novel, and some say revolutionary, legislation

3. Footnote 14, p. 594 of the majority opinion states:

"Although plaintiffs did not expressly raise on appeal the issue decided by the trial court, 'Can the Legislature constitutionally, as a condition precedent to [registration and] operation of a motor vehicle, require the purchase of no-fault personal protection insurance and no-fault property protection insurance * * *', we feel compelled to address it because of its basic, threshold importance to any decision we might render as to the No-Fault Act's constitutionality."

affecting literally millions of people and a billion dollar industry in ways utterly beyond our ability to foresee. It is imperative therefore that this Court proceed in a carefully informed manner before declaring upon the constitutionality of the compulsory no-fault insurance scheme. By disregarding the proper scope and conditions of appellate review, the majority has deliberately precluded the possibility of a better informed decision. Because the trial court heard no evidence whatever supporting any claim of inadequate casualty insurance regulation, and since none of the parties nor any of the amici either briefed or argued the "compulsory insurance" issue, the majority was able to raise and resolve the issue unburdened by any factual record and upon freewheeling speculation. In the absence of a factual basis to illuminate and give meaning to § 3101 and the manner in which it is applied, the majority has fashioned a strictly facial attack upon its constitutionality. In so doing the majority has assumed the role of the advocate rather than that of the impartially reviewing court. In assuming that posture, the majority has jeopardized, indeed abandoned, the objective and neutral stance so necessary to the proper performance of the judicial function. The inevitable result, of course, is that the Court has forsaken its ability to reach a sound decision as evidenced by its dogged determination to raise and resolve an issue which was neither contentious nor preserved, and its adoption of a most anomalous resolution of that issue.

My brothers discuss the issue of the constitutionality of the "compulsory insurance requirement" of § 3101 in the framework of two questions:

> (a) Can the Legislature constitutionally, as a condition precedent to registration and operation of a motor vehicle, require the purchase of no-fault personal protection insurance and no-fault property protection insurance or, in the alternative, require security approved by the Secretary of State?

> (b) Does the present regulatory scheme for compulsory no-fault insurance sufficiently protect the interests of registrants and operators of motor vehicles in accord with the due process clause of the Michigan and United States Constitutions as to (1) the fairness of insurance rates, and (2) the proper availability of insurance?

For the reader's benefit, I shall address the issue within the same framework.

> (a) Can the Legislature constitutionally, as a condition precedent to registration and operation of a motor vehicle, require the purchase of no-fault personal protection insurance and no-fault property protection insurance or, in the alternative, require security approved by the Secretary of State?

Authorities are abundant and unanimous that under the police power the state may regulate travel upon its public highways. *Stapleton* v. *Independent Brewing Co*, 198 Mich 170; 164 NW 520 (1917); *Bowerman* v. *Sheehan*, 242 Mich 95; 219 NW 69 (1928); *People* v. *Thompson*, 259 Mich 109; 242 NW 857 (1932); *DeVries* v. *Secretary of State*, 329 Mich 68; 44 NW2d 872 (1950). The power of the Legislature to control the operation of motor vehicles upon the highways of this state includes the power to enact legislation affecting the reciprocal rights and duties of all owners, operators, or occupants arising out of such operation. This sphere of control is the outgrowth of the state's interest in mitigating the detrimental consequences of highway motor vehicle accidents and is expressed through the enactment of legislation designed to insure a party's financial responsibility to others[4] as well as to himself.[5] The legislative decision to accomplish those legitimate

4. See, *DeVries* v. *Secretary of State, supra; Larr* v. *Secretary of State*, 317 Mich 121; 26 NW2d 872 (1947).

5. See, *Helvering* v. *Davis*, 301 US 619; 57 S Ct 904; 81 L Ed 1307 (1937); *Carmichael* v. *Southern Coal & Coke Co*, 301 US 495; 57 S Ct 868; 81 L Ed 1245 (1937).

goals by mandating the purchase of no-fault insurance by Michigan motor vehicle owners and registrants is clearly within the state's police power. The constitutional validity of the no-fault scheme is properly assessed not only as a police power regulation, but also as an integral part of the authority and interest of the state in licensing motor vehicle operators and the vehicles they own and operate.

Obviously the imposition of this "compulsory insurance" requirement upon all owners or registrants of motor vehicles required to be registered in this state may well work something of a burden upon certain persons under certain conditions. However, the imposition of such a burden is not, per se, unconstitutional. The Legislature is vested with wide discretion not only to determine what is inimical to the public welfare, but also to determine what is fairly designed to protect the public against the evils which might otherwise occur. The expediency, the wisdom, the desirability, or even the fairness, in the abstract sense, of the specific means selected by the Legislature to advance legitimate public interests is strictly within the discretion of the lawmaking body and not subject to judicial veto, providing the means chosen do not offend constitutional safeguards. In pursuance of its determination to accomplish the goals stated heretofore, the Legislature may validly condition the operation of a motor vehicle upon the procurement of no-fault personal injury protection and property damage protection insurance.

> (b). Does the present regulatory scheme for compulsory no-fault insurance sufficiently protect the interests of owners or registrants of motor vehicles in accord with the due process clause of the Michigan and United States Constitutions as to (1) the fairness of insurance rates, and (2) the proper availability of insurance?

It is with regard to this question that I believe my brothers' reasoning is most seriously erroneous and in consequence of which today's action is taken. I shall attempt, first, to identify and explain the reasoning which *must have* fathered the

majority opinion and then to demonstrate how the well-known constitutional principle upon which the majority depends has been misapplied.

The majority holds that the "compulsory insurance" requirement of § 3101 denies due process unless the government takes certain necessary steps to assure that all persons required to purchase no-fault insurance have an opportunity to do so on "fair" terms.

Although positing the view that some Michigan motorists are, in effect, denied the operation of their motor vehicles because of an inability to obtain insurance at justified, reasonable rates, the majority does not support such a conclusion with a factual record because none exists. There being no evidentiary basis upon which to predicate the assumption of the claim of unavailability of insurance, nor even appellate argument claiming it, the majority is forced to resort to an involved analysis by which an attempt is made to identify fair and equitable insurance rates as an "interest" warranting procedural protection under the due process provisions of the state and Federal Constitutions. Accordingly, the "interest" identified by the majority is an alleged "statutory entitlement" to no-fault insurance on a fair and equitable basis.

Although arguing that persons have a "statutory entitlement" to fair and equitable insurance rates, the majority meticulously avoids defining or delineating the scope of the term "statutory entitlement". Concededly, the United States Supreme Court has never explicitly defined a "statutory entitlement", nor does this form of property interest lend itself to easy definition. However, certain attributes of a "statutory entitlement" are sufficiently established in United States Supreme Court decisions to enable one to extrapolate a tentative definition of the concept.

A statute creates an entitlement claim to a governmental benefit if it defines the conditions under which the benefit must be granted or if it sets out the specific and sole conditions under

which the benefit may be denied.[6] Once the cognizable benefit is conferred or received, the individual beneficiary has a sufficient property interest in the benefit to warrant due process protection in the event the government attempts to withhold or deny the benefit.[7] Underlying this concept of a property interest to which there is an entitlement is the rationale that the recipients of governmental benefits place a reliance upon the continued receipt of those benefits which must not be arbitrarily undermined.[8]

In attempting to identify the enjoyment of fair and equitable insurance rates as such an entitlement interest, the majority ignores certain absolutely essential attributes of entitlement interests, which will be discussed hereafter, while focusing extensively upon other attributes. In declaring that there exists an entitlement interest in fair and equitable insurance rates, the Court focuses upon two factors which it claims raise insurance rates from an important if abstract economic concern to a constitutionally protected property interest, to wit: (1) a citizen's dependency and reliance upon fair and equitable no-fault insurance rates; and (2) the action of the Legislature in fostering an expectation that no-fault insurance will be available at fair and equitable rates.

In finding the necessary citizen dependence or reliance, my brothers reason that simply because "independent mobility provided by an automobile is a crucial practical necessity * * *" and "whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life", there exists therefore a constitutionally protected property interest in such registration and operation.

6. See, *Goldberg* v. *Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970); *Arnett* v. *Kennedy*, 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974).

7. See, *Board of Regents* v. *Roth*, 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Bell* v. *Burson*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971).

8. See, *Goldberg* v. *Kelly*, *supra*.

The next step my brothers take is to conclude that because the new found property interest one has in registering and operating a motor vehicle upon the highways is conditioned upon the procurement of no-fault insurance, constitutionally based procedural guarantees are also applicable to enable one to fulfill the condition. The result of such reasoning, of course, is that the provision established by the Legislature (compulsory purchases of no-fault insurance) as a condition to the exercise of the constitutionally protected entitlement interest (registering and operating one's motor vehicle upon the highways) is, through bootstrapping argument, itself elevated to a constitutionally protected entitlement interest.

Apparently recognizing that the element of citizen reliance standing alone is not sufficient to create the entitlement interest to which due process protections attach, the majority finds "a separate and independent basis for invoking due process protection for Michigan motorists required to purchase no-fault insurance", viz., legislative enactments, independent of the compulsory no-fault insurance scheme which "fostered the expectation that no-fault insurance will be available at fair and equitable rates".[9]

That somewhat convoluted route leads the Court to the conclusion that because of what it perceives to be inadequate procedural protections guaranteeing the availability of no-fault

9. "(1) All rates shall be made in accordance with the following provisions:

* * *

"(d) Rates shall not be excessive, inadequate or unfairly discriminatory." MCLA 500.2403(1); MSA 24.12403(1).

"(1) Every insurer authorized to write and writing automobile bodily injury liability and property damage liability insurance in this state shall participate in an organization for the purpose of:

"(a) Providing the guarantee that automobile insurance coverage will be available to any person who is unable to procure such insurance through ordinary methods." MCLA 500.3301(1); MSA 24.13301(1).

insurance at fair and equitable rates, the "compulsory insurance" requirement of § 3101 is unconstitutional.

The fundamental error in the reasoning of the majority is in the assumption that there is a property interest or entitlement, in the constitutional sense, in the availability of no-fault insurance at the fair and equitable rates.

Essentially, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in specific benefits". (Emphasis added.) *Board of Regents* v. *Roth*, 408 US 564, 576; 92 S Ct 2701; 33 L Ed 2d 548 (1972). When such benefits are terminated, the constitutional right to a hearing provides an opportunity for a person to vindicate his claim to such benefits. *Board of Regent* v. *Roth, supra*, 577. Obviously, procedural due process is not required until a benefit is abridged or otherwise threatened.

At the very outset my brothers err in concluding that the mandatory no-fault insurance scheme is an abridgment of the property interest one has in registering and operating his motor vehicle. The error is the result of an improper analysis of the essence of an entitlement interest. The analysis is deficient in two respects.

First, there is a failure to recognize that the property interest to which a citizen has an entitlement, and which is involved in this case, derives from the action of the state in registering or licensing a motor vehicle, a benefit which, once conferred, permits the use of a motor vehicle upon the public highways.

The concept of the *present enjoyment* of the benefit appears to be an essential attribute of the protected interests in property under the entitlement doctrine. The attribute of present enjoyment is consistent with the rationale of the recipient's dependency and reliance upon the government activity.

> "*Once licenses are issued,* as in petitioner's case, *their continued possession* may become essential in the pursuit of a livelihood." (Emphasis added.) *Bell* v. *Burson*, 402 US 535, 539; 91 S Ct 1596; 29 L Ed 2d 90 (1971).
>
> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in specific benefits." (Emphasis supplied.) *Board of Regents* v. *Roth, supra*, at 576.
>
> "The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protections attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status." *Scarpa* v. *United States Board of Parole*, 477 F2d 278, 282 (CA 5, 1973).

Second, there is a failure to appreciate that the legislative command that no-fault insurance be obtained as a condition precedent to the registering of a vehicle does not terminate or even abridge one's entitlement to that benefit, but merely defines, in part, the perimeters or dimensions of the benefit.

An individual does not possess, in the abstract, a property interest in the operation of his vehicle upon Michigan's highways. Rather, the property interest lies in his status as a registrant or licensee recipient of the entitled benefit. Until an individual acquires such licensure or proves his eligibility for it, he does not have a legitimate claim of entitlement to it. Essentially, the requirement of no-fault insurance simply conditions or defines one aspect of the eligibility for the benefit. Until an individual fulfills the eligibility requirement of obtaining no-fault insurance, he does not have a valid claim of entitlement to operate his vehicle in Michigan.

The property interest at issue was created by the Legislature and, within constitutional limitations, the Legislature is free to define its dimensions. *Board of Regents* v. *Roth, supra* 577. The condition of obtaining no-fault insurance, which is appli-

cable to all motor vehicle registrants, is no more than a partial determinant of such dimensions. So long as the condition is not palpably arbitrary or unreasonable, it does not offend due process.[10] *Michigan Canners* v. *Agricultural Board*, 397 Mich 337; 245 NW2d 1 (1976); *Grocers Dairy Co* v. *Department of Agriculture Director*, 377 Mich 71; 138 NW2d 767 (1966); *Carolene Products Co* v. *Thomson*, 276 Mich 172; 267 NW 608 (1936).

To so condition the issuance of such a license does not run afoul of Fourteenth Amendment procedural guarantees.

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or did not post security, the statute would not, under our cases, violate the Fourteenth Amendment." *Bell* v. *Burson, supra*, 539.

The majority implies that the Legislature recognized a constitutionally protected property interest in fair and equitable rates when it enacted legislation toward that end. Moreover, because of this claimed interest in fair and equitable rates, the majority opines that procedural guarantees must be effectuated in connection with the rate making process.

The validity of the statement by the majority, implying that the Legislature has recognized an *interest* in fair and equitable insurance rates by "foster[ing] the expectation that no-fault insurance will be available at fair and equitable rates", is necessarily dependent upon a showing that the alleged *interest* in fact

10. As expressed in question (a), the condition of no-fault insurance is reasonably related to the state's interest in mitigating the detrimental consequences of highway motor vehicle accidents. Moreover, the various underwriting guidelines currently employed by state regulated casualty insurers are not alleged to be arbitrary or discriminatory either by the majority or the plaintiffs on appeal. Although that challenge is not made in the instant case, it is made in Connecticut's counterpart to *Shavers, Gentile* v. *Altermatt*, 169 Conn 267; 363 A2d 1 (1975). The Connecticut court, relying on a regulatory scheme virtually identical to that enacted in Michigan, rejected the challenge to the underwriting guidelines under the traditional due process and equal protection tests. See, Conn Gen Stat Ann 38-201c, amended since the *Gentile* decision. See Conn Gen Stat Ann (Supp 1978) 38-201c.

exists. Since, as explained above, there does not exist, in the abstract, an interest in fair and equitable insurance rates, the interest in such rates, allegedly recognized by the Legislature, must exist, if at all, within the framework of this statutory scheme alone. Accordingly, we must determine whether the statutory provisions cited by the majority create an entitlement interest in such rates.

The relevant provisions of the legislative enactment upon which my brothers rely are the following:

> "(1) All rates shall be made in accordance with the following provisions:
>
> * * *
>
> "(d) Rates shall not be excessive, inadequate or unfairly discriminatory." MCLA 500.2403 (1); MSA 24.12403(1).
>
> "(1) Every insurer authorized to write and writing automobile bodily injury liability and property damage liability insurance in this state shall participate in an organization for the purpose of:
>
> "(a) Providing the guarantee that automobile insurance coverage will be available to any person who is unable to procure such insurance through ordinary methods.
>
> "(b) Preserving to the public the benefits of price competition by encouraging maximum use of the normal private insurance system.
>
> "(2) The organization created under this chapter shall be called the 'Michigan automobile insurance placement facility.'" MCLA 500.3301(1); MSA 24.13301(1).

The suggestion that, by enacting a regulatory scheme, the Legislature established a property interest in the subject matter of the regulation is constitutionally unsound. As explained earlier, a statute creates an entitlement to a government benefit when it declares the conditions under which the benefit must be granted or the conditions under which the benefit may be denied.

Rather than creating or recognizing the existence of a property interest, the first cited provision, § 2403(1), sets the standards for the casualty insurers and the Commissioner of Insurance to follow when making casualty insurance rates.

The cases cited by the majority (footnote 23, pp 599-600, majority opinion) in support of the claim that there exists an interest in "fair and equitable insurance rates", do not, in my view, stand for the stated proposition that there exists "a separate and independent basis for invoking due process protection for Michigan motorists required to purchase no-fault insurance". Rather, the cases clearly narrow and limit instances in which procedural guarantees attach to situations in which there is not only a dependency or reliance upon the alleged interest, but also a legislative recognition of the interest at issue. *Paul* v. *Davis*, 424 US 693; 96 S Ct 1155; 47 L Ed 2d 405 (1976); *Bishop* v. *Wood*, 426 US 341; 96 S Ct 2074; 48 L Ed 2d 684 (1976); *Meachum* v. *Fano*, 427 US 215; 96 S Ct 2532; 49 L Ed 2d 451 (1976); *The Supreme Court, 1975 Term*, 90 Harv L Rev 86-104 (1976).

MCL 500.3301; MSA 24.13301, cited by the majority (p. 599, majority opinion) as independently supporting the claim of legislative recognition of an interest in fair and equitable rates, merely provides for the creation of the "Michigan automobile insurance placement facility". The provision compels insurers to participate in the assignment of high risks in order to make coverage available to all, while preserving to the public the benefit of price competition through the maximum use of the normal private insurance system. Outside of citing this provision in the context of its independent basis argument, the majority does not explain how it recognizes an interest in "fair and equitable insurance rates".

Even if the majority was correct in concluding that there is a constitutionally protected entitlement interest in "fair and equitable insurance rates", there has been no showing that the compulsory insurance provision of the Act either terminates or abridges the continued enjoyment of such interest. As indicated

heretofore, Fourteenth Amendment procedural protection of property is a safeguard of interests a person has already acquired and procedural due process is not applicable until a state threatens to terminate or otherwise abridge the benefit. Although the majority alleges that a property interest in "fair and equitable rates" does in fact exist, their discussion is without any illustration demonstrating how no-fault's compulsory insurance scheme abridges or terminates this interest. The majority does not discuss the essential factor of termination or abridgment of a property interest which triggers the procedural guarantees, because it is obvious that the compulsory insurance scheme in no sense abridges any interest in fair and equitable insurance rates. The action of the Court in declaring the compulsory insurance scheme unconstitutional is, to say the least, an anomalous approach to assuring procedural safeguards for the enjoyment of such benefits.

In summary, I am persuaded that the requirements of security imposed upon *all* motor vehicle owners by the No-Fault Act, as a condition precedent to the operation of motor vehicles, does not violate Fourteenth Amendment procedural guarantees. More specifically, the statutory requirement, on its face, does not even raise Fourteenth Amendment procedural due process questions.

In today's novel declaration of unconstitutionality in futuro, for lack of procedural safeguards, the majority initiated inquiry, defined issues and objectives, and has attempted to coerce a solution.

There being no adversarial claims before the Court concerning the issue which is decided today, the compulsory insurance provision is struck down not by the adjudication of specific claims, but upon an inherently generalized approach to an abstract problem.

Perceived weaknesses, inequities, uncertainties and a concern for the *potential* unfairness of the compulsory insurance provision of the Act are elevated to the level of constitutional shortcomings to justify judicial veto. Impingement upon the

legislative function in today's judgment is glaring.[11] Lacking the appropriate plenary power to effectuate the desired purpose, the Court's declaration of unconstitutionality, in futuro, is used as a bludgeon to motivate, even compel, the Legislature and the Commissioner of Insurance to regulate the casualty insurance industry in conformance with the will of the Court.[12] To this end my brothers have even proffered a "minimal" plan unburdened by any experience, expertise or understanding of the myriad factors which are implicated in the rate making process of the industry.

In its disposition of this issue, the Court has strayed from the constitutional limits of its judicial authority and usurped the legislative function. There is a difference between the Court's *power* to make today's judgment of unconstitutionality and its proper *authority* to do so. In the instance at hand, the latter has given way to the former and the price is further erosion of the ever weakening doctrine of judicial self-restraint.

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11. Article 3, § 2 of the 1963 Constitution provides:

> "The powers of government are divided into three branches: legislative, executive and judicial. *No person exercising the powers* of one branch shall exercise *powers properly belonging to another branch except as expressly provided in this constitution.*" (Emphasis supplied.)

Judicial power is the authority to hear and decide controversies and to make binding orders and judgments respecting them. *Johnson* v. *Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959).

Constitutional duty of courts is to interpret and apply law, not to enact laws. *School District of the City of Pontiac* v. *Pontiac*, 262 Mich 338, 353; 247 NW 474; 247 NW 787 (1933).

12. The majority characterizes their bludgeon as an attempt to soften the blow in holding the No-Fault Act unconstitutional at some future date if the necessary legislative action isn't taken in the interim period. The majority cites *Robinson* v. *Cahill*, 62 NJ 473; 303 A2d 273 (1973), in support of such an approach. A review of the subsequent case history evidences the impropriety of such an approach. See *Robinson II*, 63 NJ 196; 306 A2d 65 (1973); *Robinson III*, 67 NJ 35; 335 A2d 6 (1973); *Robinson IV*, 67 NJ 333; 339 A2d 193 (1975); *Robinson* V. 69 NJ 449; 335 A2d 129 (1976); *Robinson VI*, 70 NJ 155, 358 A2d 457 (1976); *Robinson VII*, 70 NJ 464, 360 A2d 400 (1976).

Part IV. Due Process and Equal Protection Tests Applicable to the No Fault Act

I concur with the majority opinion.

Part V. Constitutionality of the Personal Injury Protection Scheme Under the No Fault Act

I concur with the majority opinion.

Part IV. Constitutionality of the Property Damage Protection Insurance Scheme Under the No-Fault Act.

I concur in the result reached by the majority. The specific constitutional issues raised with respect to the property damage protection scheme are as follows:

(a) Whether the No-Fault Act violates the due process clauses of the Michigan and United States Constitutions by abolishing the common-law remedy in tort for persons whose property is damaged by negligent motor vehicle tortfeasors;

(b) Whether the No-Fault Act violates the equal protection clauses of the Michigan and United States Constitutions by creating the following statutory classification: (1) damage to vehicular property is not covered by any mandatory insurance under optional first-party collision insurance, while spect to this kind of property are covered solely under optional first-part collision insurance, while* (2) damage to other tangible property and properly parked vehicles is covered by mandatory no-fault property damage insurance up to $1,000,000 required to be carried on the vehicle which inflicted the damage.

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* This is clearly a misprint in the official reporter. The West Reporter is:

> (1) damage to vehicular property is not covered by any mandatory insurance under the Act. Property damage claims with respect to this kind of property are covered solely under optional first-party collision insurance, while

In accord with the so-called traditional test to determine whether the no-fault scheme comports with due process, we inquire only whether the statute bears a reasonable relation to a permissible legislative objective. The learned trial judge, rather than focusing his inquiry upon the question whether the new statutory scheme bore a reasonable relationship to permissible objectives, directed his inquiry into the efficiency of the former tort property damage indemnification system. After concluding that the traditional tort system operated with adequate efficiency, the trial court held "that there was no social objective to be served by abrogating tort rights of owners of property damaged by negligent tortfeasors". Because of this overly restrictive analysis of the constitutional issue, the trial court's legal conclusion was erroneous.

As elucidated in the majority opinion, "The Legislature is as free to experiment with other ways of dealing with a subject in the hope of making a good system better as it is to correct a perceived evil system." When the trial court's analysis focused only upon the latter consideration, its inquiry into possible legislative objectives was necessarily incomplete. Upon reviewing the record, the majority found several legitimate goals which would justify the enactment of the property protection scheme. Under the deferential approach inherent in the traditional due process test, I agree that there were legitimate objectives, other than those noted by the trial court, to warrant the legislative action.

With respect to the equal protection claim, plaintiffs and cross-plaintiffs argue that the Legislature has arbitrarily treated the subject of damage to moving highway vehicles differently from that inflicted upon other tangible property. As was observed in Part III (compulsory insurance), the Legislature has a legitimate interest in mitigating the detrimental consequences of motor vehicle accidents. Generaly speaking, this is the fundamental objective of the No-Fault Act. A quick perusal of the Act makes evident the fact that the scheme is designed to insure one party's financial responsibility to others as well as to himself.

In accord with this objective, the no-fault scheme provides for compulsory third-party property damage protection insurance payable without regard to fault. Stated differently, the Act mandates the owner or registrant of a motor vehicle required to be registered in Michigan[13] to procure third-party beneficiary insurance,[14] payable without regard to fault for damage inflicted by his motor vehicle to tangible property. Out of this class of tangible property there is carved the exception of vehicular property[15] designed for operation on a public highway.[16] Damage to this class of property is excluded from property protection benefits. Plaintiffs and cross-plaintiffs argue that such statutory classifications are not rationally related to a valid objective of the No-Fault Act.

I do not agree.

In addition to the goal of assuring financial responsibility for motor vehicular inflicted damage to tangible property, the Legislature had other goals in mind. One of them involved cost considerations. As elucidated by the majority, the Legislature sought to make vehicle protection coverage more equitable by allocating premium expense for that protection exclusively to first-party collision coverage. Vehicle damage protection rates

13. In addition, the Act mandates the nonresident owner or registrant who operates or permits his motor vehicle to be operated in this state from an aggregate of more than 30 days in any calendar year to continuously maintain security for the payment of benefits. § 3102(1).

14. In order to limit the absolute liability of the insurance company, the Legislature established a $1,000,000 ceiling on the mandatory third-party property damage insurance. The choice of the $1,000,000 ceiling was justified from an actuarial standpoint.

15. Unless the vehicle is parked in such a way as not to cause unreasonable risk of the damage which occurred. § 3123(1)(a).

16. In addition to the vehicle exclusion, § 3123 excludes from property protection insurance benefits "[p]roperty owned by a person named in a property protection insurance policy, his spouse or a relative of either domiciled in the same household, if the person named, his spouse or the relative was the owner, registrant or operator of a vehicle involved in the motor vehicle accident out of which the property damage arose". § 3123(1)(b), and "property damage arising from motor vehicle accidents occurring out of this state", § 3123(2).

would thereby be calculated strictly on the basis of repair costs for one's own vehicle, rather than including in the liability coverage a cost for the potential damage to a vehicle of unknown and therefore unascertainable value. Essentially, there is a resultant shift in insurance premiums from the liability coverage to the vehicle collision coverage. With this shift the Legislature intended that premiums would more closely reflect the value of the vehicle one drives while affording a more significant premium saving to one who does not purchase the optional first-party vehicle coverage. Additionally, the Legislature hoped that this shift from liability to first-party coverage might make group insurance feasible as well as create incentives for buying more crashworthy highway vehicles.

Including moving highway vehicles within the general tangible property class and affording them third-party property protection benefits would frustrate the aforementioned objectives without significantly advancing the interest of financial responsibility.[17]

Part VII

Whether § 3101(2) of the No Fault Act Which Excludes Two-wheel Motor Vehicles from Coverage Under the Act Is Constitutional.

I concur with the majority opinion.

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17. Because of the fact that vehicles "parked in such a way as not to cause unreasonable risk of the damage which occurred" are logically blameless, and because treating such parked vehicles similarly to other tangible property would not have a significant impact on the aforementioned premium objectives, the Legislature reasonably afforded such parked vehicles no-fault property protection benefits.

"[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Village of Belle Terre* v. *Boraas*, 416 US 1, 8; 94 S Ct 1536; 39 L Ed 2d 797 (1974); and see *New Orleans* v. *Dukes*, 427 US 297; 96 S Ct 2513; 49 L Ed 2d 511 (1976).

Part VIII

Constitutionality of the No Fault Act's Statutory Scheme with Respect to the Work-loss Reimbursement and Reimbursement for Replacement Services (§ 3107)

The essence of the plaintiffs' complaint is: (1) that § 3107 violates the equal protection clauses of the Michigan and United States Constitutions because it invidiously discriminates between workers in the home and workers outside the home in terms of maximum benefits payable in case of injury; and (2) that § 3107(b) violates the equal protection clauses of the Michigan and United States Constitutions because it creates an arbitrary classification by restricting recovery for injuries to those employed in the home to expenses "reasonably incurred" for replacement services.

Reduced to its simplest, the equal protection guarantees of both constitutions mean that the Legislature may not take what may be termed a "natural class of persons", split that class in two, and then arbitrarily designate the severed factions of the original unit as two classes and thereupon enact different rules for the treatment of each. However, when there is a natural difference between the situation or circumstances of the two classes of persons, the Legislature may be justified in treating them differently. The state enjoys a wide range of discretion in distinguishing, selecting, and classifying, and it is sufficient if a classification is practical and not palpably arbitrary. *Orient Ins Co* v *Daggs*, 172 US 557; 19 S Ct 281; 43 L Ed 552 (1899).

There is a practical reason for the Legislature to make a distinction between benefits for work loss and the replacement of ordinary and necessary services. Reimbursement for the former lends itself to determination on the basis of an individual's prior wage scale, while ordinary and necessary services performed in the home are not susceptible of valuation under

the same criterion. Moreover, whereas replacement costs for ordinary and necessary services are susceptible to being incurred, one cannot ordinarily incur the cost of a substitute to perform the job of the accident victim. Additionally, the fact that the ordinary and necessary services must be incurred before reimbursement serves not only a valuation function, but also a prophylactic function which has not been shown to be unreasonable. Finally, the different maximum limits imposed by the Act appear reasonably related to their reimbursement functions.

In my view, there is no need for a remand of this matter for the taking of evidence.

Part IX

Constitutionality of the No-Fault Act's Statutory Scheme with Respect to Transient Non-Michigan Motorists and Nonresident Occupants of Motor Vehicles Not Registered in Michigan.

Essentially, plaintiffs complain that this statutory scheme violates due process and equal protection guarantees by denying no-fault benefits to the transient nonresident who has not obtained insurance from an insurer who has filed a certification in compliance with § 3163 of the Act.

I do not agree.

Rather than representing an arbitrary and capricious exercise of legislative power, this exclusion merely recognizes the realities of the situation. The Legislature, cognizant of the extent of its authority over out-of-state motor vehicles, reasonably excludes from the compulsory coverage scheme out-of-state motor vehicles which are not operated in Michigan for an aggregate of more than 30 days in any calendar year. Those nonresidents who do not voluntarily procure the no-fault coverage quite reasonably do not receive the concomitant no-fault benefits. Under the traditional test, legislation is presumed to be constitutional if any state of facts reasonably may be construed to

justify the legislative action and the classifications therein. From the record made below, it does not appear that the presumption is overcome.

Again, I perceive no benefit to be gained by a remand of this issue for further trial court action.

Conclusion

In finding the No-Fault Act constitutional, I am compelled to make explicit the following observation. The above holdings are dispositive of the challenges to constitutionality of the No-Fault Act as leveled in this lawsuit by the plaintiffs and raised by the majority, and no more. Upon a different factual predicate, another plaintiff, in the future, may well raise arguments and produce evidence sufficient to persuade me that the presumption of constitutional validity which weighs heavily today is overcome or that, as applied, the act is unconstitutional.

In reviewing the issues before us, I have been acutely conscious that the proper discharge of the judicial function, when evaluating new legislation for constitutional validity, is very narrow. It is to determine whether there is any rational relationship between the goals sought to be accomplished and the means chosen to do so. Our stated and restated deference to the legislative function, as embodied in the familiar doctrine of presumptive constitutional validity, is no mere verbalism. Its source is the doctrine of separation of powers and its life blood is judicial self-restraint. We are not free to strike down this revolutionary new concept of compensation for motor vehicle caused injury and damage because we may think it to be unwise or even at odds with our personal notions of what is fair. We test for constitutional collision. If there is none, like it or not, we ought to decline to disturb the legislative will. Stated otherwise, our review and judgment must be such as to not unduly hamper the Legislature's freedom to experiment and innovate by superimposing our judgment as to the expediency or wisdom

of the legislation over theirs. This necessary policy of deference affords the Legislature ample scope for putting its prophecies to the test of proof. The case before us is a contrived lawsuit brought one month prior to the date 1972 PA 294 became effective and is necessarily deficient in presenting evidence of the actual impact, across the board, of the no-fault scheme. Essentially, the plaintiffs produced before the trial court a body of evidence similar to that considered by the Legislature when that body was deliberating upon the propriety of adopting the scheme. That evidence included, *inter alia,* legislative facts, actuarial data, expert opinion, fiscal projections and professorial theorizing. Much of the evidence is imprecise, even highly speculative. Upon examining all of it, considering the findings of fact by the trial court, and applying those established principles of constitutional law which I have discussed, over all of which is superimposed the presumption of constitutional validity, I am persuaded that the Act is constitutionally sound.

COLEMAN, *J.*, concurred with RYAN, *J.*

FITZGERALD, *J.* (concurring in part, dissenting in part).

I write to make a few brief observations. I would uphold the constitutionality of the challenged provisions of 1972 PA 294, MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.*, as amended. At this juncture, the act, under our traditional due process and equal protection standards, is a reasonable legislative method of assuring that victims of automobile accidents are promptly and adequately compensated.

The gist of plaintiffs' many complaints about the no-fault insurance act is that the act is a heavy-handed solution to nonexistent problems in a workable tort system. Plaintiffs miss the point. Justice LEVIN's observation in *Manistee Bank & Trust Co.* v. *McGowan,* 394 Mich 655, 680; 232 NW2d 636 (1975), is pertinent:

> "Courts should proceed cautiously and should defer to legislative judgments which are reasonable. The Legislature must be free to experiment without being required to attain 'mathematical nicety' in its formulation of remedies to social and economic problems."

I would not remand any of the issues in this case for a factual determination. Because this case arises in a declaratory judgment posture, the "facts" to be gleaned on remand must necessarily be somewhat speculative. I see nothing to be gained by remanding for more current discourse on plaintiffs' perceived evils of the no-fault system. The act is not yet beyond the experimental stages.

I, too, am concerned about the procedural due process issue. I cannot, however, conscientiously reach the merits of that issue in the posture of this case. Footnote 14 of the majority opinion shows that the constitutionality of compulsory no-fault insurance in the context of rate-setting procedures was not appealed to this Court. The "actual controversy" requirement for issuance of a declaratory judgment might well be met had plaintiffs raised the issue.[1] Plaintiffs may have standing to raise the issue and the question may be ripe for decision, but the fact remains that plaintiffs did not question procedural due process in rate regulation or insurance availability. I suspect the litigants will be quite surprised at the outcome of this case.

Assuming *arguendo* that the issue of the merits of compulsory insurance /procedural due process was before us, I can not find a constitutional due process violation without a factual record. I do not address possible due process violations based on the

1. While the declaratory judgment rule, GCR 1963, 521, is to be liberally construed and administered, the granting of a declaratory judgment is still a matter of judicial discretion. To raise an issue *sua sponte* on appeal from a lower court declaratory judgment is extraordinary. I am puzzled by the majority's statement that "before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, *i. e.*, a plaintiff must allege and prove an actual *justiciable* controversy" and reference to *Kuhn* v. *East Detroit,* 50 Mich App 502; 213 NW2d 599 (1973), *lv den,* 391 Mich 815 (1974). I read *Kuhn* as strong authority for not deciding the procedural due process issue here.

entitlement doctrine relied upon by the majority because to do so does not square with my conception of the process that is due litigants from the court system.

I cannot say the question of due process protections arises in a case where no plaintiff has claimed an entitlement or a denial of due process. Due process does not exist in a vacuum. The leading entitlement cases spring from a ruling adverse to the plaintiff. See, for example, *Bundo* v. *Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976) (refusal to renew liquor license); *Bell* v. *Burson*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971) (suspension of driver's license); *Goldberg* v. *Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970) (termination of welfare benefits); *Board of Regents* v. *Roth*, 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (refusal to grant tenure); *Arnett* v. *Kennedy*, 416 US 134; 94 S Ct 1633; 40 L Ed 2d 15 (1974) (dismissal of Federal civil servant); and *Bishop* v. *Wood*, 426 US 341; 96 S Ct 2074; 48 L Ed 2d 684 (1976) (dismissal of policeman).

The law on the entitlement doctrine is not so clear but that I feel an adversary presentation is necessary to decide whether an entitlement exists. Likewise, such a presentation is needed to decide whether the requisite state action is present.[2] Moreover,

2. One author offers the following observation concerning Pennsylvania's insurance rate-making scheme, which appears essentially similar to our own:

> "Pennsylvania's insurance rate regulation procedure, despite its failure to provide for public notice and hearing before rates go into effect, does not appear susceptible to challenge under the due process clause of the fourteenth amendment. It is unlikely that a court would consider the state's role in the process to constitute state action. Nor, if the public utility analogy is employed, do consumers have a property interest in fixed insurance rates."

He goes on to say:

> "The lack of serious constitutional objections to the present rate-making scheme suggests that the resolution of the problem may lie in legislative rather than judicial hands."

Lewis, Comment: *Insurance Rate Regulation in Pennsylvania: Does the Consumer Have a Voice?*, 81 Dickinson L Rev 297, 309 (1977).

determining what due process protections are required by the Constitution ought to involve a balancing of the interests of consumers, insurance companies and the state agency charged with regulating the insurance industry.[3] I would prefer to hear what those interests are[4] before deciding what is minimally required to satisfy due process.

While there may come a time when the people of the State of Michigan deserve an opinion on a question not raised by the litigants, requiring us to assume facts not in the record, the instant case does not warrant such judicial initiative. I would not today take judicial action to precipitate a crisis at the risk of hasty and ill-conceived reform. At this juncture I would leave what some perceive as a crisis in the hands of those who best understand the problems and solutions.

3. The Insurance Commissioner has indicated some of the pertinent considerations:

> "The concern for essential insurance availability and regulation manifests itself in several ways which at first glance seem unrelated. Some people cannot easily find the necessary insurance at all. Others, though they can find insurance, feel that the rate charged is unfair, either in absolute terms or in comparison to the rate charged to others. A third category of consumers find their choice of company limited so that they are unable to select the quality of service they would prefer, or are hesitant to shop among companies because they fear cancellation of their coverage. The public also questions the extent and nature of government involvement in the marketplace. On the one hand, there is little dispute that government should intervene in the free marketplace where the marketplace will not by itself act in the public interest. On the other hand, there is a strong and growing sense that government regulation has come to intervene in cases where it is unnecessary and may in fact be a negative influence. All of these concerns are pertinent to Michigan, and must be examined if sound public policy is to exist."

Insurance Bureau, *A Report to the Governor: Essential Insurance in Michigan* (1977), p. 4.

4. Some of the considerations to be balanced are listed in Comment: *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke Law Journal 89, 120-122.

In a proper case, at another time when the procedural due process issue is properly raised, and a factual record is developed so that we can determine whether or not "rates are * * *, in fact, 'excessive, inadequate or unfairly discriminatory' ", my decision could be otherwise. This Court should bide its time until that proper case arrives.

I cannot accept the majority's attempt to soften the blow by holding the act unconstitutional at some future date if no legislative or agency action is taken. As authority for that procedure, *Robinson* v. *Cahill*, 62 NJ 473; 303 A2d 273 (1973), is cited. That decision, invalidating New Jersey's method of financing public schools through local and *ad valorem* taxation of real property, is now commonly referred to as *Robinson I*. A look at the later history of that case convinces me that this Court ought not follow a similar procedure.[5]

In sum, today's action by the majority potentially junks a workable solution to a problem of importance to the entire population and dictates to the Legislature in a manner neither seemly nor called for. The Court embarks on a perilous course of grave consequence to everyone.

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5. See *Robinson II*, 63 NJ 196; 306 A2d 65 (1973) (court would not distrub statutory scheme previously held unconstitutional unless Legislature failed to enact by December 31, 1974, legislation compatible with *Robinson I*); *Robinson III*, 67 NJ 35; 335 A2d 6 (1975) (court declined to determine a remedy for the 1975-76 school year); *Robinson IV*, 67 NJ 333; 339 A2d 193 (1975) (court mandated provisional remedies for the 1976-77 school year). The provisional remedies were not put into effect because the Legislature did enact a statutory scheme designed to remedy the constitutional defects noted in *Robinson I*. In *Robinson V*, 69 NJ 449; 355 A2d 129 (1976), the court found the new statute facially constitutional, conditioned on the assumption that complete funding would follow. The court retained jurisdiction. When complete funding did not follow the court issued an injunction freezing spending for New Jersey's public schools, *Robinson VI*, 70 NJ 155; 358 A2d 457 (1976). The injunction was dissolved by order on July 9, 1976 because the Legislature provided for funding by enacting a state income tax. *Robinson VIII*, 70 NJ 464-465; 360 A2d 400 (1976).

COLEMAN, *J.* (concurring in part; dissenting in part). Although I have signed the opinion of Justice RYAN because it provides a detailed analysis of the majority's Part III approach to the "No-Fault" Insurance Act (MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*), I concur also with Justice FITZGERALD's forthright opinion. In addition I express a separate concern which embraces the whole of this heretofore unperceived constitutional doctrine, today born full grown without benefit of facts, briefs, oral arguments, prior consideration of any lower court and without knowledge of the plaintiffs or defendants.

I

Justice WILLIAMS writes the truth when he says:

> "The interest of plaintiffs that is affected by compulsory no-fault insurance is not a previously recognized common-law or constitutional right."

He also truly warns:

> "We are deeply aware that our holding not only directly affects the problems of motorists and the insurance business in this state, but that it also *substantially affects our entire system of civil justice*." (Emphasis added.)

Indeed it does. It is a giant step towards government *management* of private enterprise through judicial mandate. With no facts and little or no claimed expertise in the insurance industry, the majority assumes a stance of power and sweeps out to transform the management of an entire private industry into a *state* function and therefore subject to such regulation as has been reserved for state agencies. The majority finds that "[t]his legislation goes beyond a grant of a monopoly or an attempt to regulate a utility" and so the action of the automobile insurance industry must "be treated as that of the state itself".

Like modern day legal alchemists, the Court has managed to transform the insurance rate-setting process from what was essentially a series of private actions with some governmental

supervision to that magical "state action" which opens the door to "state action" constitutional controls. The astonishing display of bootstrapping used to achieve this feat—because the state requires the public to purchase a certain product from a private business as a prerequisite to engaging in a certain private activity, the action of that business is thus state action—dangerously blurs the necessary and important distinction between private enterprise and public government.

By analogies of "apples and oranges"[1] (as described in the other minority opinions) and an analysis based on a factual vacuum and highly questionable premises,[2] a new face has been

1. *E.g.*, compare with the issuance of driver's licenses, liquor licenses, etc. discussed in Justice FITZGERALD'S opinion.

2. (1) The Insurance Code protects against "excessive, inadequate or unfairly discriminating rates", a standard commonly employed throughout the country and in Michigan. Nevertheless, the majority finds the standard a "mere exhortation" in the absence of "legislative definition" and "without any history of prior court interpretation". First, like "fair and equitable prices", any single "definition" is unlikely to cover the innumerable factual possibilities. Facts and circumstances are necessary against which to test the standards. Facts are lacking here, so understandably we were not expected by the parties to test the statutory protection in a vacuum. The Commissioner or the judiciary will be able to judge fairly what is an "excessive, inadequate or unfairly discriminatory rates". The words are ordinary and widely used in statutes and regulations. Even if it were true that there is "no history of court interpretation" of this standard, one has to ask, "How does such a history begin?"

Noting that the same standards apply to all insurance in Michigan, and have for many years, I wonder how this finding of inadequacy will affect all other areas of the industry.

(2) The majority say that there are inadequate statutory provisions for a motorist attacking the validity of an individual rating decision. I see no bar to an individual's attack upon the base rate nor an attack upon an arbitrary or capricious individual premium or assignment of risk.

Also the Uniform Trade Practices Act in MCL 500.2027; MSA 24.12027 specifically includes within its protection discrimination against individuals. Among other prohibitions are

> "(a) Refusing to insure, or refusing to continue to insure, or limiting the amount of coverage available to an individual or risk because of any of the following:

(Footnote continued on next page.)

painted on the concept of "due process".[3] It is not becoming. It is not practical. It is dangerous.

II

It is unbecoming and even dangerous because it is precedent for the Michigan Supreme Court *sua sponte* to contrive an "issue" and to use it as a vehicle to "affect the entire system of civil justice" and, incidentally, freedom of the marketplace in Michigan.

If four people can, unsolicited, manipulate the Constitution so as to dictate to the Legislature in precise terms the method of removing one industry effectively from the competitive field of free enterprise, what business or industry will be next?[4]

The opinion lays the groundwork for government (judicial?) regulation of private industry such as our people have never countenanced. "Super-regulation" would be a suitable—and kind—name for the concept.

(Footnote continued from preceding page.)

> "(i) Race, color, creed, marital status, sex, or national origin * * *.
>
> "(ii) The residence, age, handicap, or lawful occupation of the individual or the location of the risk * * *."

See (iii) for additional property insurance protections, including refusal to insure or to continue to insure and charging of different rate.

(3) The third complaint is similar to the second alleging "no adequate statutory provision permitting an individual to challenge insurance refusal, discriminatory cancellation, or assignment to the 'Automobile Placement Facility' with its presumptively higher rates". In addtiion to the Uniform Trade Practices Act, see MCL 500.3220, 500.3244; MSA 24.13220, 24.13244, for statutory procedure for insurance cancellation. An even more strict bill is being argued in the Legislature at this writing.

3. The Fourteenth Amendment of the United States Constitution provides

> "nor shall any State deprive any person of life, liberty, or property, without due process of law".

(Footnote continued on next page.)

III

The opinion as to Part III is not only unbecoming to the judiciary and dangerous to a free society, but it is impractical because it uses a costly "blunderbuss to kill a fly". For instance, it creates a right in *every* dissatisfied motorist (in 1975 there were 5.7 million vehicles registered in Michigan and 6.0 million licensed drivers) to obtain a "prompt and effective administrative review" of *an insurer*. Because this Court lacks the experience and expertise within its membership or the means peculiar to the Legislature of acquiring it, we cannot assess the financial impact upon the customers and taxpayers in general (often the same people).

At a minimum, we must anticipate for this requirement alone a corps of additional administrative law judges, attorneys for both sides, court reporters and other staff, quarters, equipment and other necessities.

Note also that "all rights accrued by individuals against their insurers or against the 'Automobile Placement Facility' " will "remain valid" until the order of the Court is entered, so a formidable backlog already will exist at the very beginning.

In any event, this requirement alone can be calculated to raise costs to taxpayers and raise premium costs which even at the present high level are a bargain nationally for unexcelled coverage.[5]

(Footnote continued from preceding page.)

In Michigan, Const 1963, art 1, § 17 provides:

"No person shall be * * * deprived of life, liberty or property, without due process of law."

4. I suspect it may be the remainder of the insurance industry.

5. A recent State Insurance Bureau report to the Governor (the 1977 report is cited by the majority) concluded:

"No-fault insurance is paying more benefits to more accident victims in a more timely manner than any other automobile insurance system in the country. No-fault is also saving about $45 million per year in insurance costs because of benefit coordination with a potential savings of at least $105 million.

* * *

Such Part III requirements are certainly not necessary under any present concept of constitutional law. Nor are they necessary to accomplish the ends of fairness (see fn 2).

Perhaps all of us, including the insurance companies, would like to see some changes in the act. Even without this extraordinary judicial tack, changes are likely to take place where they should—in the Legislature.

Be that as it may, the majority imposes upon us its philosophy of "the more governmental regulation, the better". I believe that broader, rather than tighter, regulatory perimeters are basic to efficient, less expensive, more competitive production. In fact, business—especially small and medium-sized business—already is sinking in a sea of bureaucratic, costly red tape.

While trying to kill the fly, we may be crippling or dealing a mortal blow to a free marketplace. We cannot know the complete impact of this decision upon this and other business. The Legislature and the Governor have been making studies and holding hearings to determine what changes are indicated in the act after the first five years of experience. We should not *sua sponte* usurp their functions.

"No-fault collision is also providing people with more options to control their insurance rates through self-insuring portions of their coverage. It also increases equity by making more people pay only for repairing their own car and not for repairing the average car. * * *

"Finally, no-fault has not been directly responsible for increases in insurance rates. The increase in insurance rates in Michigan has been consistent with the rate increases in other comparable states—both tort and no-fault. Also, insurance rates in Michigan over the past several years have not increased as rapidly as the prices of products the insurance purchases. In addition, no-fault has saved almost $70 million per year from the costs of a tort system. The public is concerned about rate increases, but this is a national phenomenon, independent of no-fault." Insurance Bureau, A Report to the Governor: *No-Fault Insurance in Michigan: Consumer Attitudes and Performance* (1978), pp 60-61.

IV

In summary, my greatest and separately expressed concern with the majority opinion is two-fold: (1) Part III is precedent for our Court to make decisions removing the very foundations of our legal process without any facts, briefs, arguments of counsel, lower court consideration or knowledge of the parties, and (2) in the course of such show of power, it becomes precedent also for a blurring almost to extinction of the lines between private enterprise and governmental action. Indeed, the opinion converted a private industry into a function of the government and warned us of more to come—and all this quite unnecessary to the desired end.

Although I do not agree with—or even understand[6]—some of the other arguments and requirements, my concern runs so deeply towards enhancing, and not undermining, our basic freedoms, including that of the marketplace, that I have focused

6. *E.g.*, Part III sets forth certain requirements, § 2 of which seems to contradict itself. Subsection (a) requires that premiums be set "without regard to factors assertedly warranting differences in premiums". Subsection (b), however, requires a statement of factors which may be considered by the insurer in differentiating premiums among those insured and (c) requires "the amount of differential appropriate for each such factor".

Does the 2(a) requirement mean that all premiums for the same coverage be the same as to each person (as to the same company)? Do 2(b) and (c) allow specified classifications for specified risks at specified amounts? If so, how does (a) correlate with (b) and (c)?

Also, it is not clear whether a consumer is expected to "shop around" among competing companies for one willing to take a greater risk or charge a lesser premium. The words seem to provide that anyone ("every motorist") who feels aggrieved by the first offer can demand a full-scale hearing before an administrative law judge and subsequent rights of appeal as provided by the Administrative Procedures Act.

The expectations of the purchaser are not at all like expectations of a person shopping for the automobile, from which these new constitutional (?) rights spring.

briefly and quickly (after having read all other opinions and references)[7] upon this basic flaw in the principal opinion.

Therefore, I dissent in part and concur in part.

7. Justice Williams attempts to legitimatize discussion of the due process sufficiency of the act's regulatory scheme by reference in fn 14 of his opinion to plaintiff counsel's statement at oral argument requesting this Court to utilize the briefs filed in the *Court of Appeals "on any issues* that were otherwise *inadequate or deficient* in this reviewing court". (Emphasis added.) There was no such issue before this "reviewing court" to be "inadequate" or "deficient".

(The only due process issue raised below concerning the act's regulatory scheme was based on the theory of an improper delegation of legislative authority. The entitlement doctrine and state action theories used by the majority today were not issues below.)

APPENDIX B.

CATHERINE SHAVERS, et al.,
Plaintiffs-Appellees,

57916

v.

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, et al.,
Defendants-Appellees,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,
Defendants,

and

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants-Appellants,

and

ALLSTATE INSURANCE COMPANY,
Defendant and Cross-Appellant.

CoA: # 21238-9
LC: # 73-248-068

At a Session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the City of Lansing, on the 8th day of June in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable THOMAS GILES KAVANAGH, *Chief Justice*, G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., *Associate Justices.*

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED IN PART and AFFIRMED IN PART and the cause is REMANDED to the circuit court for the county of Wayne for further proceedings in conformity with the opinion filed herein. The Court reserves ruling on the constitutionality of section 3101(1) of 1972 PA 294 for a period of eighteen months from the date of this order and retains jurisdiction for purposes of such ruling.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of December in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ CORBIN R. DAVIS,
Deputy Clerk.

[SEAL]

APPENDIX C.

State of Michigan

IN THE SUPREME COURT

CATHERINE SHAVERS, et al., *Plaintiffs, Appellants and Appellees,* vs. FRANK J. KELLEY, Attorney General of the State of Michigan; RICHARD H. AUSTIN, Secretary of State of Michigan; DANIEL J. DEMLOW, Commissioner of Insurance of the State of Michigan; AETNA CASUALTY & SURETY COMPANY; THE TRAVELERS INDEMNITY COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; CONTINENTAL CASUALTY COMPANY; THE HOME INDEMNITY COMPANY; and LEAGUE GENERAL INSURANCE COMPANY, *Defendants, Appellants, Appellees and Cross-Appellees,* and ALLSTATE INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Defendants, Cross-Plaintiffs, Cross-Appellants and Appellees,* and DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE and RIVERSIDE INSURANCE COMPANY OF AMERICA, *Defendants and Appellees.*	Nos. 57916, 57931, 57934 and 57935.

APPLICATION FOR REHEARING ON PART III OF THE COURT'S OPINION BY STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY, THE TRAVELERS INDEMNITY COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL CASUALTY COMPANY, THE HOME INDEMNITY COMPANY, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE AND RIVERSIDE INSURANCE COMPANY OF AMERICA

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STATEMENT OF QUESTIONS INVOLVED

I.

Does fundamental fairness require that the court grant rehearing to provide defendant insurers the opportunity to address the issues of state action and statutory entitlement which no party pleaded or proved in the trial court, which no party argued or briefed on appeal and which the court raised *sua sponte* without requesting all parties to address these issues in supplementary briefs?

Applicants answer "Yes".

II.

Did the court err in concluding that the no fault act's requirement that insurance or other security be maintained on all registered motor vehicles in Michigan creates a statutory entitlement to such insurance such that due process hearings are required whenever insurers make decisions affecting rating of risks and availability of insurance because such decisions constitute state action?

Applicants answer "Yes".

III.

Assuming, *arguendo*, that such due process hearings are required to be provided, did the court's analysis of Michigan law overlook or mistakenly interpret existing statutory provisions which accord constitutionally adequate hearing procedures to individuals for challenging insurers' decisions affecting rating of risks and availability of insurance?

Applicants answer "Yes".

State of Michigan

IN THE SUPREME COURT

CATHERINE SHAVERS, et al., *Plaintiffs, Appellants and Appellees,* vs. FRANK J. KELLEY, Attorney General of the State of Michigan; RICHARD H. AUSTIN, Secretary of State of Michigan; DANIEL J. DEMLOW, Commissioner of Insurance of the State of Michigan; AETNA CASUALTY & SURETY COMPANY; THE TRAVELERS INDEMNITY COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; CONTINENTAL CASUALTY COMPANY; THE HOME INDEMNITY COMPANY; and LEAGUE GENERAL INSURANCE COMPANY, *Defendants, Appellants, Appellees and Cross-Appellees,* and ALLSTATE INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Defendants, Cross-Plaintiffs, Cross-Appellants and Appellees,* and DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE and RIVERSIDE INSURANCE COMPANY OF AMERICA, *Defendants and Appellees.*	Nos. 57916, 57931, 57934 and 57935.

APPLICATION FOR REHEARING

The defendant insurers named in the caption of this application urge rehearing on Part III of the court's opinion because:

1. It is offensive to fundamental concepts of fairness, and possibly to the requirements of due process, for an appellate court to base its decision on issues no party pleaded or proved in the trial court and which no party argued or briefed on appeal, as did this court in raising *sua sponte* and deciding the state action and statutory entitlement issues without requesting all parties to address the issues in supplementary briefs.

2. The court erred in concluding that the no fault act's requirement that insurance or other security be maintained on all registered motor vehicles in Michigan creates a statutory entitlement to such insurance such that due process hearings are required to be provided whenever insurers make decisions affecting rating of risks and availability of insurance because such decisions constitute state action.

3. Assuming, *arguendo*, that such due process hearings are required to be provided, the court's analysis of Michigan law overlooks or mistakenly interprets existing statutory provisions which accord constitutionally adequate hearing procedures to individuals for challenging insurers' decisions affecting rating of risks and availability of insurance.

The applicants for rehearing appreciate fully the delicacy of the task undertaken in filing this application, for the court must be persuaded that it has erred on a matter of very gravest importance, the validity of an act which the court acknowledges in its opinion "profoundly and importantly affects a crucial dimension of our lives." 402 Mich. at 590.* The delicacy of the task is

* The breadth of the interpretations of this court's opinion is astonishing. See *Trial*, August 1978, page 4, "No-fault R. I. P.?",
(Footnote continued on next page.)

compounded because the court's errors include its own disregard of that very procedural safeguard it asserts the Legislature has failed to provide Michigan motorists, an opportunity to be heard. Still other errors are committed by the court in its application of case law and in its interpretation of statutory provisions, perhaps because the parties were not heard on the issues of state action and statutory entitlement, neither in arguments nor in their briefs.

I.

THE IMPROPRIETY OF THE COURT'S SUA SPONTE DECISION ON STATE ACTION AND STATUTORY ENTITLEMENT

The court's holding, that the no fault act's compulsory insurance requirement created a statutory entitlement to such insurance and that insurers' rate and availability decisions are state action, involves issues raised for the first time in the five-year history of the case by this court on its own motion. It is not applicants' claim that the court *cannot* decide the appeal on these issues. *Instead, applicants contend that the appeal ought not to have been decided by the court on such issues, at least not before all parties had been accorded an opportunity to be heard on the issues.* The court's apparent belief, set forth in its footnote 14, that plaintiff-appellants' pleadings and their brief to the Court of Appeals should have alerted the appellees that the state action and statutory entitlement issues were before the court simply is mistaken.

(Footnote continued from preceding page.)
and 31 ATLA L. Rep. 242-243 (August 1978), copies of which are attached for the court's convenience. Mr. Justice Frankfurter, over half a century ago, warned of the risks inherent in advisory opinions. Frankfurter, *A Note on Advisory Opinions*, 37 Harv L Rev 1002, 1002-1006, 1008 (1924). Those risks lurk also when a court decides issues unaided by adversary briefs and oral argument.

A. The Court's Footnote 14

Contrary to the inferences contained in footnote 14 of the court's opinion, 402 Mich at 593-594, none of the briefs filed in behalf of the plaintiffs nor defendants nor *amici curiae* so much as mentioned the phrases "state action" or "statutory entitlement" nor any other which fairly can be said to have put any of the parties on notice that those issues were involved in this appeal and, therefore, should have been addressed by counsel.

In footnote 14 the court justifies its reaching and deciding the appeal on state action and statutory entitlement grounds on the basis that the trial court upheld the validity of the act's requirement, in § 3101(1),* that insurance be maintained and on the basis that certain of the defendants addressed that portion of the trial court's decision in their briefs on appeal notwithstanding that appellants had not appealed from that portion of the trial court's decision.** The court then refers in footnote 14 to the

* Citations in this application to statutory sections are, unless otherwise noted, to the Insurance Code of 1956, as amended, 1956 PA 218, MCLA 500.100 *et seq.*, MSA 24.1100, *et seq.* Code section citations can be converted to MCLA citations by adding 500. as a prefix to the Code sections and to MSA citations by adding the prefix 24.1. Thus, § 3101(1) of the Code is MCLA 500.3101(1), MSA 24.13101(1).

** The court's footnote 14 reference to League General's brief is mistaken. There is no discussion of the insurance requirement ruling of the trial court at page 17 nor at pages 35-36 of League General's brief. Similarly, the *amicus curiae* brief of Progressive Casualty Company, at page 1, contrary to the court's assertion, focuses upon § 3101(2), which defines "motor vehicles," and not upon § 3101(1), which requires maintenance of insurance. Furthermore, that page 1 reference in Progressive's brief is found in its Statement of Questions Presented with the express statement immediately following that that issue is *not* addressed in the brief. While Allstate's and Detroit Automobile Inter-Insurance Exchange's briefs, as the court noted, supported the trial court's ruling upholding the act's requirement that

(Footnote continued on next page.)

plaintiffs' general concern with the rate impact of the act, calling that general concern "a constant underlying issue throughout the litigation of this case," but it does not explain on what basis plaintiffs' expression of generalized concern justified its consid-

eration and decision *sua sponte* of the state action and statutory entitlement issues.

Footnote 14 also refers to the trial court's pretrial statement that the adequacy of legislative standards to guide the Insurance Commissioner's actions on rate filings was before that court for decision, clearly a pure delegation of legislative authority issue, and it is noted in the footnote that the trial court failed to decide that issue. What the court fails to note in its footnote, however, is that plaintiffs did not ask the trial court for a decision on that legislative delegation issue, even in their application for rehearing, 303a-307a, nor did they raise that issue in the Court of Appeals, nor in this court.* Even had plaintiffs presented evidence on the legislative delegation issue at trial and preserved that issue for appellate review, it does not follow that this court thereby would be justified to substitute, instead, the state action and statutory entitlement issues for decision *sua sponte* without

(Footnote continued from preceding page.)

insurance be maintained as a proper exercise of the state's police power, neither of those parties, nor any other party, including plaintiffs, so much as suggested that that statutory requirement raised the further, and wholly discrete, issues of state action and statutory entitlement.

* The court mistakenly asserts in footnote 14 that the plaintiffs referred to the legislative delegation issue at pages 2 and 22 of their initial brief and at pages 34-36 of their supplementary brief. No such references to the legislative delegation issue appear on the pages of the plaintiffs' initial brief cited by the court. As for the plaintiffs' supplementary brief, the court's reference might more properly have been to pages 35-41, but if the court's attention had been focused on those pages, it would have been apparent to the court that plaintiffs' discussion of the legislative delegation issue was limited to its affect upon only §§ 3109(3) and 3109a, both dealing only with the power of the Insurance Commissioner to approve deductibles.

according all of the parties an opportunity to be heard even if only by filing post-argument supplementary briefs.

The court, also in footnote 14, quotes one short paragraph from the plaintiffs' brief in the Court of Appeals, which very generally asserts the inadequacy of statutory guidelines for the Insurance Commissioner's actions on rates. That paragraph is found at page 273 of plaintiffs' 319 page printed brief filed in the Court of Appeals. The quoted language appears under a caption entitled "The Vagaries of PA 294" and under a sub-

caption entitled "Administrative Costs." There is nothing contained in the plaintiffs' statement of questions presented to the Court of Appeals, nor is there anything else in the entire 319 page printed brief submitted by them to the Court of Appeals, that could fairly be said to have raised properly even the legislative delegation issue, to say nothing of the state action and statutory entitlement issues. It is no wonder that none of the defendants addressed any of those three issues in the Court of Appeals nor, as this court acknowledged, did the Court of Appeals decide any of those issues.

B. Unfairness of Court's Decision

Applicants acknowledge that this court in deciding appeals cannot be bound by the ineptitude of counsel. Thus, if counsel fail to cite in their appeal briefs relevant evidentiary facts from the trial record on any issue preserved for appellate review, the court nonetheless is entitled to plant its decision on such relevant facts and no party can be heard properly to complain. Similarly, if counsel fail to cite controlling statutes or court decisions or even persuasive precedent on any issue properly before the court, the court certainly is entitled to decide such issue on the law as the court perceives it to be notwithstanding the failures of counsel. See *Huntress* v *Estate of Huntress*, 235 F2d 205, 209 (7 CA,

1956); *Federal Deposit Ins Corp* v. *Vest*, 122 F2d 765, 768 (6 CA, 1941), cert. den., 314 US 696 (1941). In such circumstances, counsel at least would have had an opportunity to be heard, for the court's decision would not have strayed from the issues tried and properly preserved by the appellants for appellate review.

In this court's decision in *Shavers*, however, the court has reached beyond the issues presented to it by appellants and has planted its decision on issues as to which no evidence was presented or offered during the trial and which none of the legion of parties nor *amici curiae* even was aware were issues troubling the court until its decision was rendered.

The importance of the no fault act is reflected fully in this court's records and reports. The act was the subject of a massive appearance and protracted hearing before the court in 1973. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 208 NW2d 469 (1973). The *Shavers* case was filed as a double class action immediately following the court's issuance of its advisory opinions and was expedited for early trial in recognition of the act's importance to practically every person in this state. Lengthy briefs were filed on appeal to the Court of Appeals and to this court. At the hearing of this appeal, oral argument time limits were extended by the court. Decision came 15 months later. Notwithstanding the Justices' familiarity with the act and their awareness of the multiplicity of constitutional challenges directed against it during its two visits to this court, no Justice asked a single question during oral argument of this appeal to suggest to any participating counsel that decision would or might turn on the issues of state action and statutory entitlement. Nor did the court, during its 15 months of deliberation on the appeal request supplementary briefs on those issues from the parties.

With the utmost respect for this court, applicants suggest that the parties to this appeal have been denied that measure of fairness which all litigants are entitled to expect from all courts of this state. It requires no profound exposition of fundamental principles of fairness as developed in the courts of our country and other common law nations to establish that every litigant should be accorded at least an opportunity to know what issues properly are before the court for decision and to be heard on those issues.

Such notice is the function pleadings perform in our trial courts. *Applebaum* v *Wechsler*, 350 Mich 636, 87 NW2d 322 (1958); *Auburn* v *Brown*, 60 Mich App 258, 230 NW2d 385 (1975). Our rules of practice provide means for preserving issues for appellate review, even when trial courts refuse or fail to decide triable issues. *American Electrical Steel Co* v *Scarpace*,

399 Mich 306, 249 NW2d 70 (1976); GCR 1963, 507.5 and 516.2. This court's GCR 1963, 853.2(1)(a), expressly requires that appellants state in their briefs the questions involved which the court is asked to decide. And this court's reports are replete with decisions ruling that questions not included in an appellant's statement of questions involved are deemed waived. Indeed, even in the court's decision in this case of *Shavers*, the court abstained from reaching two issues because, said the court, they "appear to have been abandoned." 402 Mich at 592. See, also *Buckley* v *City of Bloomfield Hills*, 343 Mich 83, 85, 72 NW2d 210, 211 (1955); *Mitcham* v *City of Detroit*, 355 Mich 182, 94 NW2d 388 (1959). Many respected appellate courts, having themselves identified important or even decisive unargued legal issues, refuse to decide appeals on such issues.*

* *Hampton* v. *Superior Court*, 38 Cal 2d 652, 656, 242 P2d 1, 3 (1952); *Laramore* v. *Laramore*, 64 So2d 662, 670 (Fla 1953); *Verlinden* v. *Godberson*, 238 Iowa 161, 25 NW2d 347 (1947); *Pettus* v. *City of St. Louis*, 328 SW2d 636 (Mo, 1959).

In footnotes 25 and 28 of the court's opinion, the court quotes from "A Report to the Governor on Essential Insurance in Michigan" made by the Commissioner of Insurance, one of the defendants in this case. The report was issued on March 14, 1977, almost two weeks following oral argument before this court. The defendant Commissioner's report obviously was not included in the evidentiary record on appeal, nor was it filed with the court by the Commissioner, nor by any other party, in supplementation of the record on appeal, by stipulation of all parties or by order of the court. Nonetheless, the court relies upon the defendant Commissioner's statements and opinions to buttress the court's opinion and conclusions regarding the adequacy of existing statutory procedures for assuring fairness of rating decisions and availability of insurance without allowing the other parties an opportunity to comment or respond.

The court's right to take judicial notice of universally accepted facts is not questioned; indeed, it was conceded by all parties to this appeal in the trial court and in this court. However, the

court's references to the Insurance Commissioner's report to the Governor is far different from its taking judicial notice of universally acknowledged facts. If it be proper at all, it must only be as notice of legislative facts, but there is something which rubs the wrong way when a court utilizes a report prepared, while appellate decision is pending, by one of the parties before it without according any of the other parties to the appeal an opportunity to establish the invalidity of the statements and opinions contained in it.

The unfairness of the court's decision *sua sponte* on issues none of the litigants even was aware concerned the court extends beyond the litigants directly involved in this appeal. It reaches virtually every person in this state when the impact of the court's decision invalidating the no fault act is considered.

C. Supplementary Briefs Should Have Been Requested or Reargument Should Have Been Ordered

Mr. Justice Frankfurter suggested the most obvious procedure which was available to this court and which it should have followed prior to its decision. In his concurring opinion in *Sherman* v *United States,* 356 US 369, 378, fn 2, 2 L Ed2d 848, 78 S Ct 819 (1958), Justice Frankfurter wrote: "It is of course not a rigid rule of this Court to restrict consideration of a case merely to arguments advanced by counsel. * * * The solution, when an issue of real importance to the administration of criminal justice has not been argued by counsel, is not to perpetuate a bad rule but to set the case down for reargument with a view to re-examining that rule." That procedure has been followed by this court, or supplementary briefs have been requested, in cases of far less significance to the people of this state and to the administration of justice than is involved in this case of *Shavers.* See *Meloche* v *Flowers, Incorporated,* 274 Mich 385, 393, 269 NW 309 (1936); *Mary* v *Lewis,* 399 Mich 401, 249 NW2d 110 (1976).

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Applicants respectfully suggest that the court grant their motion for rehearing of this appeal limited, however, to the question:

> Does the no fault act's requirement that no fault insurance or other security be maintained on all registered motor vehicles in Michigan raise a state action issue and create a statutory entitlement to such insurance and, if so, do Michigan's laws provide due process procedures for challenging insurer's decisions affecting rating of risks and availability of such insurance?

II.

STATE ACTION AND STATUTORY ENTITLEMENT TO NO FAULT INSURANCE

Applicants, if granted the opportunity on rehearing to address the state action and statutory entitlement issues, will present to the court comprehensive arguments against a finding of state action and statutory entitlement. Those interrelated issues are difficult for courts to resolve even with the benefit of adversary presentations; without such presentations, the reliability of judgment is impaired.

A. State Action

Few concepts in constitutional law are as nebulous as state action. The United States Supreme Court has never attempted to fashion a definitive standard by which the conduct of an ostensibly private entity can be considered state action necessitating application of due process restrictions. Instead, that court has focused its attention upon each case's peculiar facts:

> "* * * Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v *Wilmington Parking Authority,* 365 US 715, 722, 81 S Ct 856, 6 L Ed2d 45 (1961).

— 11 —

Before holding private insurance companies serving Michigan "to the same duties of observance of constitutional rights as are imposed upon a government unit," *McQueen* v. *Druker,* 438 Fd 781, 784 (1 CA, 1971), several factors should have been examined to determine if the act of an insurance company can fairly be said to be the act of the state itself.

The conduct in question, private insurers' decisions regarding rates and availability of insurance, should have been closely examined. The nature of overt official involvement is one

factor to be considered. Compare *Fuentes* v. *Shevin*, 407 US 67, 92 S Ct 1983, 32 L Ed2d 556 (1972), with *Flagg Bros, Inc* v *Brooks*, ... US ....., 98 S Ct 1929, ... L Ed2d ..... (1978). The fact that insurance companies are the subject of extensive state regulation, however, is not determinative:

> "* * * The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of Fourteenth Amendment." *Jackson* v *Metropolitan Edison Co*, 419 US 345, 350, 95 S Ct 449, 42 L Ed2d 477 (1974).

As Justice Stevens pointed out while still a judge of the Seventh Circuit, there must be a showing that the state affirmatively supports or encourages the challenged private conduct before that private conduct is transformed into state action. *Cohen* v *Illinois Inst of Technology*, 524 F2d 818 (7 CA, 1975), cert. den., 425 US 948. Mere acquiescence by the state is insufficient. *Flagg Bros, supra*. As recently announced by the Supreme Court in *Jackson* v *Metropolitan Edison Co, supra*, 419 US 345, 357:

> "Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' "

Government support of otherwise private conduct, by way of a grant of monopoly status, use of government property or funds or the like, while not controlling, is one factor that should be considered in deciding if there is state action. For example, the restaurant involved in *Burton, supra*, was located in government owned property and its patronage was affected by the adjacent government parking facility. *Jackson, supra*, while finding that a public utility's termination of service was not state action, notes the importance of monopoly status:

> "* * * It may well be that the acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics." 419 US 345, 350-351.

The nature of the function performed by the private entity must also be considered. The exercise by a private entity "of powers traditionally exclusively reserved to the State," *Jackson, supra*, 419 US 345, 352, will help support a finding of state action. *Marsh* v *Alabama*, 326 US 501, 66 S Ct 276, 90 L Ed 265 (1946); *Terry* v *Adams*, 345 US 461, 73 S Ct 809, 97 L Ed 1152 (1953). Even the fact that the private entity provides "essential" services, unless these services are "traditionally associated with sovereignty," *Jackson, supra*, 419 US 345, 353, is by itself insufficient. For example, in *Palmer* v. *Columbia Gas of Ohio, Inc*, 479 F2d 153 (6 CA, 1973), the Sixth Circuit observed that defendant, in addition to having a monopoly over the business of supplying natural gas to Toledo, also had been granted the power of eminent domain.

The relationship between the state and a private enterprise may be so interdependent that it can be called "symbiotic." If this is the case, as it was in *Burton, supra*, state action can more easily be found. Not every close relationship, however, qualifies as symbiotic. See *Scott* v *Eversole Mortuary*, 522 F2d 1110 (9 CA, 1975), in which the court held that a contractual relationship between a private business and the state, even

when the private entity is heavily regulated by the state, did not require a finding of state action.

The factors discussed above are many, but not all, that must be examined before a determination properly can be made whether state action exists. Applicants, of course, believe that the decisions of private insurers regarding insurance rates and availability "may [not] fairly be treated as [those] of the State

itself." *Jackson, supra,* 419 US 345, 351. They request that the court on rehearing engage in the "detailed inquiry * * * required in order to determine whether the test [for state action] is met." *Jackson, supra,* 419 US 345, 351.

B. Statutory Entitlement

The court, having decided that it would disregard the established dichotomy between private insurers and the state so that the actions of private insurers become in effect the actions of the state, next decided that operating a motor vehicle was a protected interest which, when threatened by insurers' decisions on the rating of risks and availability of insurance, required due process procedures for challenging such decisions.

Our Constitutions do not recognize as a protected interest the mobility resulting from operating a motion vehicle. There is no constitutional entitlement to a driver's license. The United States Supreme Court, in *Bell* v *Burson,* 402 US 535, 539, 91 S Ct 1586, 29 L Ed2d 90 (1971), said:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment."

In fact, the United States Constitution is not the *source* of "entitlements," but only provides for their protection once otherwise established.

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem

> from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," *Board of Regents* v *Roth,* 408 US 564, 577, 92 S Ct 2701, 33 L Ed2d 548 (1972).

The court's opinion in this case, however, seems to give independent constitutional stature to one's interest in a driver's license by raising to constitutional magnitude the right to the insurance required for registration and operation of a motor vehicle. For example, the court declares:

> "In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates." 402 Mich 554, 599.

The court's opinion then refers to the motorist's entitlement to insurance as of *constitutional* magnitude:

> "We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis." 402 Mich 554, 600.

Later in the opinion the following statement appears:

> "* * * However, due process, at a minimum, requires that rates are not, in fact, 'excessive, inadequate or unfairly discriminatory' * * *." 402 Mich 554, 601.

The source of any entitlement to or protected interest in insurance, even insurance necessary to register a vehicle, must be statutory if it exists at all. Our Constitutions only provide protection for such rights, if any, independently derived. The view that property rights or entitlements have a constitutional source has long been rejected as unwarranted judicial usurpation of the Legislature's primary authority over economic matters. *Nebbia* v *New York,* 291 US 502, 54 S Ct 505, 78 L Ed 940 (1934); *West Coast Hotel Co* v *Parrish,* 300 US 379, 57 S Ct 578, 81 L Ed 703 (1937); *General Motors Corp* v *Attorney General,* 294 Mich 558, 293 NW 751 (1940).

Only be rewriting a legislative expression of purpose to guarantee the availability of insurance through an automobile place-

ment facility, §§ 3301 *et seq.*, can the court transform that guarantee into an entitlement to obtain insurance through ordinary methods from any private insurer doing business in the state. The Legislature's decision on availability of no fault insurance is clear. Except as prohibited by the Uniform Trade Practices Act, §§ 2001 *et seq.*, particularly § 2027, insurers are free to determine which risks they will underwrite. The statute creating the placement facility recognizes that some vehicle owners will not be able to obtain insurance in the ordinary market by making such inability the condition for eligibility for insurance from that facility. Section 3365. One of the express purposes of the statute creating the facility is:

> "Providing the guarantee that automobile insurance coverage will be available to any person who is unable to procure such insurance through ordinary methods." Section 3301.

This statute simply cannot form a proper basis for a finding of statutory entitlement to insurance, apart from the placement facility, from any private insurer doing business in the state. In fact, it negates such a claim. The Legislature has said that if insurance is not available from private insurance companies, it will be available through the placement facility. The court now says insurance always must be available directly from private insurance companies, but if that be so, what role, then, would the placement facility fulfill?

The Legislature also has clearly indicated that competition must be allowed to play an essential role in the regulation of insurance rates. In Chapter 24 of the Insurance Code, on casualty insurance rates, the Legislature expressly disclaims that it intends "to prohibit or discourage reasonable competition."

Section 2401. In explaining the phrase "excessive, inadequate or unfair discriminatory" rates,* the Legislature has declared:

* The standard that rates shall not be "excessive, inadequate or unfairly discriminatory" is found in the Model Rating Bill prepared

(Footnote continued on next page.)

> "A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided *and a reasonable degree of competition does not exist* with respect to the classification, kind or type of risks to which the rate is applicable." Section 2403(1)(d). (Emphasis supplied).

The statute creating the placement facility also mentions that one of its purposes is the preservation of the benefits of price completition. Section 3301.

The court's opinion, while it acknowledges the Legislature's preference for competition as the primary means by which insurance rates should be regulated, imposes an inconsistent entitlement with respect to rates. As with the court's creation of a right to obtain insurance from any insurer, the court's action on insurance rates impinges impermissably upon a subject on which the Legislature, with proper authority, already has acted.

III.

EXISTING STATUTES PROVIDE CONSTITUTIONALLY ADEQUATE HEARING PROCEDURES FOR CHALLENGING INSURERS' DECISIONS AFFECTING RATING OF RISKS AND AVAILABILITY OF INSURANCE

Assuming, *arguendo,* that the court is right in its decision that due process hearings are required for challenging insurers' decisions affecting rating of risks and availability of insurance (402 Mich at 593-601), the court clearly erred in concluding that existing statutory procedures in Michigan are inadequate to that due process task. The court overlooked in its analysis

(Footnote continued from preceding page.)

by the National Association of Insurance Commissioners and adopted in its essential provisions by Michigan and other states. NAIC Proceedings (1946).

some statutory provisions pertinent to individual insureds' rights relating to premiums and insurance availability. In other instances the court's analysis stopped short of examining all of the requirements of specific statutory sections criticized by the court. These and other defects in the court's analysis will be considered in this part.

If applicants are correct in their contention that existing statutes provide procedures sufficient to assure fairness in the rating of risks and the availability of no fault insurance, then the court's conclusion invalidating the act lacks an essential element. Applicants here ask for an opportunity on rehearing to establish that there are existing statutory provisions which satisfy the court's perceived due process need. What follows, therefore, is not a definitive exposition of the adequacy of existing statutory procedures but, rather, is an effort to persuade this court that on rehearing it ought to make a more careful analysis of existing law in order to uphold Michigan's no fault act if there be any way properly to do so.

A. The Court's Analysis of Statutes Regulating Rating of Risks, 402 Mich at 600-603

Several references are made in the court's opinion to § 2403 (1)(d) of the Insurance Code. 402 Mich at 599, 601 and 607. On each occasion, the reference is to the short introductory sentence to subdivision (d) of subsection (1) of the statutory section. The introductory sentence quoted by the court reads: "Rates shall not be excessive, inadequate or unfairly discriminatory." After quoting the foregoing language at the bottom of page 601, the court asserts that it is "without the support of clarifying rules established by the Commissioner, without legislatively sufficient definition, and without any history of prior court interpretation." While the court is right in stating that the statutory language has not been the subject of prior court interpretation, at least not in Michigan, the court simply is wrong

in stating that the Commissioner has provided no clarifying rules and that there is no legislatively sufficient definition.

Had the statutory entitlement issue been presented to the court properly, or had the court asked for supplementary briefs on the issue, defendants would have had an opportunity to advise the court that the Commissioner indeed has issued informally to insurers written instructions and guidelines detailing with a very high degree of specificity factors to be considered by insurers in filing, and by the Insurance Commissioner in reviewing and approving, casualty rates. The constitutional validity of a legislative act, the no fault act, cannot be affected by the fact that the defendant Commissioner has not elected to issue formal rules and regulations, as authorized by § 2484 of the Insurance Code of 1956, in which event section 46 of the Administrative Procedure Act,* would have required that such rules and regulations be published for ready reference by this court as well as by the public generally. The fact that the defendant Insurance Commissioner's instructions and guidelines are not published in form readily available to this court, explain the court's mistaken belief that the statutory requirements relating to rates are "without the support of clarifying rules established by the Commissioner." That mistake would not have occurred had the parties been accorded an opportunity to address the state action and statutory entitlement issues.

The court also is mistaken in its statement that "[t]he statutory stricture against 'excessive, inadequate or unfairly discriminatory rates' is * * * without legislatively sufficient definition." Had the court continued its quotation from § 2403(1)(d) of the Insurance Code beyond the first short introductory sentence of the subdivision, it would have discovered the following legislative definition of the meaning of the terms "excessive" and "inadequate" as applied to rates:

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* MCLA 24.246(3), MSA 3.560(146)(3)).

"A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided

and a reasonable degree of competition does not exist with respect to the classification, kind or type of risks to which the rate is applicable. A rate shall not be held to be inadequate unless the rate is unreasonably low for the insurance coverage provided and the continued use of the rate endangers the solvency of the insurer; or unless the rate is unreasonably low for the insurance provided and the use of the rate has or will have the effect of destroying competition among insurers, creating a monopoly or causing a kind of insurance to be unavailable to a significant number of applicants who are in good faith entitled to procure such insurance through ordinary methods."

That language was added to the Code by 1969 PA 346. It clearly defines what is meant by an excessive rate and an inadequate rate.* This would have been particularly apparent to the court had its attention been drawn to the immediately preceding subdivisions (a), (b) and (c) of § 2403(1).

It is not sufficient to extract a single short introductory sentence from one subdivision of a statutory section and to hold it to be constitutionally insufficient without considering that language in its textual context. That immediate textual context reads in its entirety as follows:

"Sec. 2403. (1) All rates shall be made in accordance with the following provisions:

"(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings

* While the term "unfairly discriminatory" is not explicitly defined in § 2403, legislative definitions of that term are contained in abundance in Chapter 20 of the Insurance Code of 1956, defining and prohibiting unfair trade practices. See particularly, as applied to rates, § 2027(c) of the Code, discussed at pages 21 and 22, *infra*.

or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, to underwriting practice,

judgment, and to all other relevant factors within and outside this state.

"(b) The system of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

"(c) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which measure variations in hazards or expense provisions, or both. Such rating plans may measure any differences among risks that may have a probable effect upon losses or expenses as provided for in subdivision (a).

"(d) Rates shall not be excessive, inadequate or unfairly discriminatory. A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist with respect to the classification, kind or type of risks to which the rate is applicable. A rate shall not be held to be inadequate unless the rate is unreasonably low for the insurance coverage provided and the continued use of the rate endangers the solvency of the insurer; or unless the rate is unreasonably low for the insurance provided and the use of the rate has or will have the effect of destroying competition among insurers, creating a monopoly or causing a kind of insurance to be unavailable to a significant number of applicants who are in good faith entitled to procure such insurance through ordinary methods.

"(2) Except to the extent necessary to meet the provisions of subdivision (d) of subsection (1), uniformity among insurers in any matters within the scope of this section is neither required nor prohibited."

It is not fair for this court to assert, as it has, that subdivision (d)'s statutory stricture against "excessive, inadequate or un-

fairly discriminatory" rates is "reduced to mere exhortation" when § 2403 is read in all of its parts. Nor can the statutory language fairly be dismissed as "mere exhortation" when considered in light of the written instructions and guidelines promulgated and enforced by the defendant Insurance Commissioner.

As noted in the footnote at page 19 above, § 2403 does not contain its own definition of "unfairly discriminatory," but the Uniform Trade Practices Act, contained in Chapter 20 of the Insurance Code, clearly prohibits conduct by insurers which nobody would deny constitutes unfair discrimination. For exemple, § 2037(a) and (b)* prohibit discriminatory conduct by insurers as it affects the availability of insurance, which will be discussed later in this application beginning at page 26, and § 2027(c) prohibits discriminatory rates for the same coverage if the discrimination is based on sex, marital status, age, residence, location of risk, handicap or lawful occupation of the risk. The statutory language pertinent to discriminatory conduct relating to rates reads as follows:

"Sec. 2027. Unfair methods of competition and unfair or deceptive acts or practices in the business of insurance include:

* * * * *

"(c) Charging a different rate for the same coverage based on sex, marital status, age, residence, location of risk, handicap, or lawful occupation of the risk unless the rate differential is based on sound actuarial principles, a

* The section was added to the Uniform Trade Practices Act by 1976 PA 273, effective April 1, 1977.

reasonable classification system, and is related to the actual and credible loss statistics or reasonably anticipated experience in the case of new coverages. This subdivision shall not apply if the rate has previously been approved by the commissioner."

In light of § 2027, it hardly can be said, as is clearly inferred by the court's opinion in this case, that the statutory term "unfairly discriminatory" is "without legislatively sufficient defini-

tion." If there be need for administrative gloss to the legislative definition, the Uniform Trade Practices Act expressly provides a procedure, in § 2047(3), by which the defendant Insurance Commissioner may issue rules and regulations relating to unfair trade practices.

The court next refers critically to § 2403(1)(c) for, as it asserts at page 602, authorizing insurers to utilize "any" classification scheme which "may measure any differences among risks that *may* have a *probable* effect [up]on losses or expenses." The last quoted language is not an accurate quotation of the statute in the sense that it is not complete in a very pertinent respect and it is taken out of context. The language omitted which is pertinent to an understanding of the quoted language is underlined in the following quotation of § 2403(1)(c) in its entirety:

"(c) Risks may be grouped by classification for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which measure variations in hazards or expense provisions, or both. Such rating plans may measure any differences among risks that may have a probable effect upon losses or expenses as provided for subdivision (a)."

It is clear under the statute, read as a whole, that rates cannot be arbitrary, but that they must measure variations in *hazard* and *expense*. Compare § 2426. Further, when subdivision (a)

of § 2403(1) is considered, it becomes clear that the court cannot fairly characterize the statutory language it quotes as constitutionally inadequate, nor can it fairly be said that the language authorizes insurers to utilize "any" classification scheme. The statutory proviso's reference to subdivision (a) limits the differences among risks which may have a probable effect upon losses or expenses and which may be reflected in rating plans to those differences which are referred to in subdivision (a) of § 2403(1). That subdivision, in its entirety, is set forth again for the court's convenience:

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> "Sec. 2403. (1) All rates shall be made in accordance with the following provisions:
>
> "(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazard, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, to underwriting practice, judgment, and to all other relevant factors within and outside this state."

When all the statutory language is considered, it is obvious that the statutory use of the terms "may" and "probable effect", which the court criticizes, are not licenses for arbitrary action but, instead, are merely proper English usage in referring to a situation where a present price must be charged to cover future losses which "may" occur but which "may" not, that price to be based on the probability that the loss will occur ("probable effect").

The court may very well have been misled in its references to the language of subdivision 2403(1)(c) by its footnote 25 reference to the defendant Insurance Commissioner's report to the Governor. The court's quotation from that report mirrors

the court's asserted conclusion concerning § 2403(1)(c), "that rates can be established on insubstantial bases which do not satisfy due process." Had the court's attention been drawn to subdivision (a) of § 2403(1), as it most certainly would have had the parties to this appeal been accorded an opportunity to be heard on the issue of statutory entitlement, it could not properly have concluded that the statute lacked substantial bases for the establishment of rates.

Nor, had all parties been heard on these issues, it is likely that the court would have concluded, as it did at page 602, that the language of subdivision 2403(1)(c) allows arbitrary action or invidious discrimination in the absence of adequate safe-

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guards provided by administrative rules or legislative definition of the language. As applicants have demonstrated, the legislative definition is contained in subdivision (a) of § 2403(1) and, contrary to the quoted statement from the defendant Insurance Commissioner's report to the Governor, the Legislature has provided the Commissioner with more than adequate power to ensure that rates are not unfairly discriminatory. Section 2472 authorizes the Commissioner to promulgate rules governing the collection of data necessary to aid him in determining whether rating systems meet the requirements of § 2403.

Section 2484 of the Insurance Code expressly authorizes the Commissioner to make reasonable rules and regulations necessary to effect the purposes of Chapter 24 of the Code, § 2400 of which defines the purpose of the chapter to be "to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory." He has the power, already granted to him by the Legislature, to provide the people of this state with those safeguards against arbitrary action or invidious discrimination which the court mistakenly believed are lacking. There is nothing more the Legislature properly can be required to do in order to meet the

commands of due process as they relate to standards to be applied in rating of insurance risks.

At pages 602 and 603 of the court's opinion, the court expressly states that Michigan's statutes do not accord due process because insurance company filings are not open to public inspection until after they become effective and because, even when a filed rate is challenged by an insured complainant and the Commissioner concludes that it does not meet statutory requirements, the Commissioner is authorized to invalidate the filing, not *ab initio*, but only prospectively. Several of the court's statutory references in the paragraph beginning at the bottom of page 602 are erroneous. First, it is not § 2408 of the Insurance Code which provides that rate filings submitted by insurers are open to public inspection only after the filing be-

comes effective; it is § 2406(1). Nor does § 2408 provide for administrative review by complainants, as stated by the court; instead, persons aggrieved with respect to any filing made by an insurer are granted the right to a hearing before the Insurance Commissioner by § 2420 of the Code.

Wholly apart from the obvious typographical errors referred to above, the court ignores the existence of another remedy already provided by the Legislature to an insured who desires to challenge the validity of a rate charged for insurance. That remedy is provided for in § 2458 of the Code. That section requires insurers to provide a reasonable means for any person aggrieved by the application of the insurer's rating system to be heard on the manner in which the rating system has been applied. The section also provides for an immediate appeal before the Insurance Commissioner who may affirm or reverse the insurer's action. The full text of § 2458 reads as follows:

> "Sec. 2458. Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment

> of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate. Every rating organization and every insurer which makes it own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject such request within 30 days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within 30 days after written notice of such action, appeal to the commissioner, who, after a hearing held upon not less than 10 days' written notice to the appellant and to such rating organization or insurer, may affirm or reverse such action."

Had that section of the Code been brought to the court's attention, as it most certainly would have been had the parties to this appeal been accorded an opportunity to be heard on the issues of state action and statutory entitlement, the court could not properly have said, as it did, that a complainant insured is left with "the unacceptable choice of paying the invalid rate from the date of the effective filing until the subsequent date when the filing is no longer effective or taking the risk of not having insurance." See 402 Mich at 603. Section 2458 contemplates that insurers will adjust premium rates if their rate filings are shown to be applied improperly to an individual insured and it grants to the Insurance Commissioner the power to require such an adjustment if the insurer fails voluntarily to make it.

To summarize: The court's analysis of the statutes pertaining to the establishment of rates and to the procedures for challenging such rates misinterprets existing statutory law and

overlooks statutory law presently in effect. For such reasons alone the court ought to grant rehearing on the state action and statutory entitlement issues.

B. The Court's Analysis of Statutes Regulating Availability of Insurance, 402 Mich at 603-605

At pages 603-605 of the court's opinion, the court concludes, inexplicably, that Michigan statutory law does not provide an individual with a constitutionally adequate remedy for assuring the availability of no fault insurance. The court says, mistakenly, that Michigan law fails to provide "an individual legal remedy for challenging" an insurer's discriminatory refusal or cancellation of such insurance in violation of § 2027 of the Code, a part of the Uniform Trade Practices Act. It also says that the statutory automobile placement facility does not adequately protect an individual insured against unfair rates, nor does it provide access to the varieties of coverage available in the standard

market, nor does it accord a hearing to those seeking to challenge their assignment to the facility. In short, this section of the opinion focuses upon the availability of no fault insurance at fair and equitable rates and concludes that Michigan's laws are constitutionally deficient in failing to provide individual insureds with due process procedures for enforcing the legislative "guarantee" of availability of no fault insurance.

In footnote 27, the court notes that the Uniform Trade Practices Act, specifically § 2029 of the Code, authorizes the Insurance Commissioner to proceed against any insurer violating the Act by unfair methods of competition or unfair or deceptive acts or practices. It then refers to § 2026 which defines certain acts or practices which constitute "a course of conduct indicating a persistent tendency to engage in" unfair methods of competition and unfair or deceptive acts or practices. That section expressly excludes from the definition of such practices "isolated

incidents" and the court, focusing its attention upon that exclusion and notwithstanding its earlier reference to the immediately following section of the Uniform Trade Practices Act, § 2027, concludes mistakenly in its footnote 27 that the Commissioner is not empowered to proceed against any insurer for "instances of unfair deceptive acts or practices, etc., affecting a single individual." However, the exception contained in § 2026 applies only to the conduct forbidden by that section and it does not apply to the conduct forbidden by other sections, e.g., § 2027.

That latter section, § 2027, to which the court had made reference earlier in its opinion, at page 603, contains no exception of "isolated incidents" and is the section which proscribes conduct which the court itself describes as "patently discriminatory", such as refusing to insure or refusing to continue to insure individuals or risks because of race, color, creed, marital status, sex, or national origin, the residence, age, handicap, or lawful occupation of the individual or the location of the risk, or because of previous denial of insurance coverage. The powers granted to the Insurance Commissioner to issue cease and desist

orders for violation of the Uniform Trade Practices Act are found in §§ 2028 through 2041 of the Code. Neither those sections, nor any other section of the Code precludes the Insurance Commissioner from invoking his cease and desist power to enforce the provisions of § 2027, even when "isolated incidents" are involved.

Furthermore, § 2028 clearly contemplates that individuals shall bring to the Insurance Commissioner's attention facts showing probable cause to believe that the Uniform Trade Practices Act has been violated in which event the Commissioner is granted the power to examine and investigate. Section 2030 provides that any person having an interest likely to be affected adversely by the Insurance Commissioner's cease and desist hearing has the right to intervene, to appear and to be heard

at the hearing by counsel or in person. Subpart (2) of § 2030 makes it crystal clear that an insured may intervene in opposition to the insurer which is the subject of the proceeding.

Section 2038 requires the cease and desist hearing to be held pursuant to the Administrative Procedures Act, 1969 PA 306, MCLA 24.201, *et seq.*, MSA 3.560(101), *et seq.* That same section provides that the Commissioner may impose a monetary penalty for violation of the Uniform Trade Practices Act, may suspend or revoke an insurer's certificate of authority to conduct insurance business in this state, and may require refund of any overcharges.

Judicial review of the Insurance Commissioner's decision is authorized by § 2038 and by § 244 of the Code. In the event the Insurance Commissioner's decision does not charge a violation of the Uniform Trade Practices Act, then § 2045 authorizes any intervenor in the proceedings to appeal the decision.

In light of the foregoing, it is impossible to comprehend the court's conclusion, at page 603, that Michigan's law "does not provide such motorists with an individual legal remedy for challenging an alleged discriminatory basis for the refusal or

cancellation" of insurance. But there is more. The Administrative Procedures Act makes available to any interested person a declaratory ruling by any agency, including the Insurance Bureau, as to the applicability to an actual state of facts of a statute administered by that agency or of a rule or order of the agency. MCLA 24.263, MSA 3.560(163). There is nothing in that Act which would preclude an individual insured from seeking such a declaratory ruling from the Insurance Commissioner relating to the applicability of the Uniform Trade Practices Act, for example, § 2027, to any state of facts which the insured claims constitute a discriminatory refusal or cancellation of insurance by an *insurer*.

In any opinion considering an individual's legal rights and remedies upon discriminatory refusal or cancellation of insurance, one normally would expect reference to be made to statutory provisions limiting the grounds upon which insurance can be refused or cancelled, but the court's opinion makes no reference to such statutory provisions.

Section 3204 of the Code prohibits* insurers from cancelling policies of automobile liability insurance unless the cancellation is effected pursuant to the provisions of Chapter 32 of the Code. Every no fault insurance policy issued in Michigan is required to include residual liability insurance. See §§ 3101(1) and 3131. Thus, every no fault automobile insurance policy is governed by the restrictions contained in Chapter 32 of the Code. Section 3220 expressly limits the grounds upon which such policies can be cancelled. There are only two. Section 3220, in its entirety, reads as follows:

> "Sec. 3220. Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of

> automobile liability insurance except for any 1 or more of the following reasons:
>
> "(a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.
>
> "(b) That the named insured or any other operator, either resident of the same household or who customarily operates an automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final."

Any cancellation, except under § 3220(a), may be appealed to the Insurance Commissioner in a simplified manner and

* Just three days before this court's decision in *Shavers*, the Legislature on June 5, 1978 enacted 1978 PA 218 which imposed a six month moratorium upon §§ 3204 to 3260 of the Code dealing with the subject of cancellation of automobile insurance.

notice of the right to appeal must accompany the cancellation. See §§ 3224, 3230, 3234, 3240 and 3244. Furthermore, § 3244 provides that judicial review may be sought from the Commissioner's final determination.

Also relevant to any inquiry concerning discriminatory cancellation of insurance policies is § 3021 of the Code. That section expressly forbids cancellation or refusal to renew any insurance policy including any class of motor vehicle coverage because the insured has reached the age of 65 years so long as the insured still has a valid Michigan motor vehicle operators' license.

The court's criticism of the automobile placement facility, at page 604, includes the statement that a motorist placed in the facility is subject to a statutory presumption that rates charged will be higher than those charged in the open market place. Section 3365 is cited in support of that criticism. However, the court's criticism is overstated. The cited statute merely says that eligibility for insurance through the placement facility terminates if the insured is offered coverage in the voluntary market at lower rates. Furthermore, it is evident from the statutory pattern that the Legislature designed the placement facility to provide access to insurance as a last resort for those otherwise not qualified to purchase insurance in the voluntary market for reasons other than those barred as reasons for refusal to insure

or for cancellation by the Uniform Trades Practices Act, specifically § 2027. As demonstrated above, anyone refused insurance or whose insurance is cancelled for any of he discriminatory reasons covered by § 2027 has a ready remedy. Others who are refused insurance or whose insurance is cancelled for other reasons may seek coverage from other insurers in the voluntary market or through the placement facility.

Rates charged for insurance obtained through the placement facility are subject to the prior written approval of the Insurance

Commissioner just as are rates charged by insurers in the voluntary market. See § 3340. Absent any statutory exemption of placement facility insurance rates from Chapter 24 of the Code, dealing with the filing and approval of casualty insurance rates, placement facility insurance rates are subject to the same limitations which are imposed upon the voluntary market in the rating of risks by §§ 2400 *et seq.* discussed earlier in this application. Included in those limitations are the factors set forth in § 2403 which, among many other things, include the legislative admonition that rates shall not be "excessive, inadequate or unfairly discriminatory."

In any event, § 3380 provides for a review procedure by which motorists insured through the placement facility can challenge decisions by the facility affecting premiums and coverages furnished. In the first instance, § 3380(1) provides that the hearing be before the Board of Governors of the facility, but § 3380(3) provides that the decision of the Board of Governors may be appealed to the Insurance Commissioner whose own decision, presumably, is subject to judicial review under § 244 of the Code, as are all other decisions made by he Commissioner.

The court also, at page 604, criticizes the placement facility because rates charged for insurance obtained through it are subject to the same procedural and substantive inadequacies the court said it identified in the voluntary market. However, as applicants have demonstrated in earlier parts of this application,

the court overlooked or mistakenly interpreted statutory provisions which, properly viewed, impose constitutionally adequate regulations over the establishment of rates in that market.

In its criticism of the placement facility, the court comments, without citation to the record or to any other authority, that the facility does not provide access to the same varieties of coverage options offered in the standard market. See page 604.

The fact is, however, that *the facility offers all no fault automobile insurance coverages mandated by law, specifically the coverages required by § 3101(1).* Applicants know of no constitutional theory, and the court mentions none, which would impose upon the placement facility an obligation to offer the same varieties of coverage options as are available in the voluntary market.

Finally, the court criticizes the placement facility because it says there is no statutory provisions allowing a motorist to challenge his assignment to the facility. Apparently, the court simply overlooked § 3355 which sets forth the process by which a motorist obtains insurance through the facility. No one unilaterally places or assigns an insurance applicant to the placement facility. Section 3355 provides that every agent authorized to sell automobile insurance must offer to place coverage through the facility for any qualified applicant who is ineligible or unacceptable for coverage by the insurer for which the agent is authorized to sell automobile insurance and only if the applicant accepts the offer, is his insurance then placed with the facility.

For all of the foregoing reasons, applicants respectfully suggest to the court that its expressed concerns about the constitutional adequacy of the procedures provided by Michigan law for challenging decisions affecting the availability of no fault automobile insurance are without foundation.

RELIEF

Applicants respectfully pray entry by this court of an order vacating Part III of its opinion on appeal, directing that supplementary briefs be filed on the state action and statutory entitlement issues and setting a date for the rehearing of this appeal on those issues.

Respectfully submitted,

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August 31, 1978

PRESIDENT'S PAGE

No-Fault R.I.P.?

Though continually accused of selfish motives, one of the main reasons we have consistently opposed federal auto no-fault legislation is that it does not provide for adequate regulation of the insurance industry. While requiring the public to purchase insurance through the myth of state regulation, it leaves them to the "tender mercies" of the insurance industry in providing fair and non-discriminatory rates.

Our position and the finding by the LaFalce subcommittee that there is no effective state regulation was recently confirmed by the Michigan Supreme Court which dealt compulsory no-fault auto insurance a mortal blow.

In a June 9 decision by Justice G. Mennen Willams, the court ruled that while the principle of compulsory no-fault is constitutional, tne administrative mechanisms are not. The shock to the no-fault supporters must have been so great that they did not fell the pain because they were calling the decision a "victory" for no-fault theory. The fact is that a legal theory illegally applied is no theory at all.

The echoes of this ruling will be ringing through the halls of Congress because the Michigan law has been touted as the model for the nation. This may be the clanging of the death knell for national no-fault because the federal proposal is deficient in the very safeguards that the court found lacking. In light of this ruling, Congress would have to create a super-agency to oversee state compliance with the court's mandate, an anathema to the insurance industry. The decision, too, is vindication for Senators Donald Riegle (D-Mich.), John Durkin (D-N.H.), and other congressional stalwarts who steadfastly argued that you cannot put the fox in charge of the henhouse.

The Michigan court found that while consumers were forced to carry no-fault insurance purchased from private firms, they

were inadequately protected from excessive, unfair, and discriminatory rates and denied mechanisms to challenge individual rates, rate structures, and cancellations. The court further found that there were serious deficiencies in the Michigan act and declared that "the entire rate structure is suspect."

In a unique "first," the court said that since the state had made privately-provided no-fault insurance compulsory, the actions of the insurance sellers were the same as actions of the state itself. There is no federal regulation of the insurance industry and state regulations are not directed toward guaranteeing fair and non-discriminatory rates. The insurance industry has historically frowned on regulation and, until this decision, no court had held that the actions of the industry constituted state action.

Detroit attorneys Harry M. Philo and Shelddon L. Miller were in the vanguard of the fight that led to the Michigan decision. Philo, chief counsel for the plaintiffs, hailed the ruling as the "end of no-fault legislation that allows insurance companies to rip off motorists with discriminatory rates, surcharges, and unwarranted cancellations."

Philo cited some shocking statistics that 175,000 motorists had been forced into assigned risk pools by the act, that 600,000 lower-income vehicle owners had been denied registrations and that another 600,000 had been forced into substandard companies with excessive rates. He also said that individual owners have had increases of 50 percent while corporate owners of some 600,000 vehicles had rate cuts of 50 percent.

While these abuses may come as a revelation to some, they have been clear to trial lawyers for some time. And we have been forceful in pointing out the problems to those who make the laws. Just last summer, then ATLA President Bob Begam said this about no-fault before the Senate Commerce Committee:

"If we are to be taxed, and that is all this is, a tax, in order to fund an automobile reparation welfare system, then let it be

the government and not the American insurance industry which does the taxing."

Numerous ATLA members have issued the same warning. If that were not enough, all legislators had to do was look at the course of public sentiment about no-fault (see news item, TRIAL, June 1978, page 6). Opinion polls and letters to newspaper editors across the nation, many from Michigan, show overwhelming dissatisfaction with no-fault.

The old saying that "eternal vigilance is the price of liberty" still applies. The Michigan court has allowed 18 months to remedy no-fault's administrative deficiencies or the law becomes invalid. It remains to be seen whether insurance industry no-fault supporters will back away from advocating their compulsory insurance privilege or face effective and meaningful government regulation. We must remain vigilant so that the insurance interests do not apply a band-aid to a compound fracture.

The message to the US Congress should be clear. This is not the time to pursue experimental federal no-fault plans.

The lack of effeceive state regulation is not restricted to automobile, malpractice or products liability insurance, but is equally deficient in all areas of the casualty industry. Instead of continuing their onslaught against the rights of their innocent victims, doctors and manufacturers should join with us in securing positive legislation which will assure that liability insurance is available and affordable by all.

TOM DAVIS

picture

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The *ATLA Law Reporter* editors are always glad to receive information about litigation of any kind, from any source, and will generally acknowledge its receipt immediately. We regret that the volume of such reports received makes it impossible for us to publish everything we get.

When writing to tell us about a case, be sure to include: (1) the full case caption; (2) the official name of the court in which the action was filed; (3) the docket or case number; (4) the date (day, month, and year) of the judgment, verdict, or settlement; (5) a statement of facts comparable to those set out in the case abstracts published in this issue; and (6) the names of all counsel involved in the case. If a case is later reversed or settled, we appreciate receiving word of that development.

August, 1978

FROM THE EDITOR'S SCRATCH PAD

Michgan Supreme Court Declares Unconstitutional Rate-Making and Pricing Provisions of State's Auto No-Fault Law and Those Permitting Fast-and-Loose Cancellations, Nonrenewals, and Casting Unpreferred Motorists into Assigned-Risk Pool —State Legislature and Insurance Commissioner Given 18 Months to Rectify Rate-Making Inequities so as to Pass Constitutional Muster—Present Rate-Making Mechanisms Are Constitutionally Inadequate to Assure That the Compulsory Coverage Is Available at Fair and Equitable Rates.

The Michigan Supreme Court recently so held in a landmark decision which may place in legitimate jeopardy pending and enacted No-Fault laws in the other states. Moreover, since pending federal No-Fault bills are mirror images of the mortally wounded Michigan Act, the decision may signal "High Noon" for the federal proposals. The Michigan milestone decision is *Shavers el al.* v. *Attorney General et al.*, ... N. W. 2d ..... (Mich., Nos 57916, 57935, 57931, June 8, 1978), 46 U. S. Law Week 2681-83 (No. 50, June 27, 1978). The opinion for the 4-3 majority was written by Justice G. Mennen Williams and, including Syllabus and 3 concurring and dissenting opinions, is 108 pages long.

The Michigan No-Fault Act gave the private insurance industry a captive market—a Big Bonanza—by forcing all car owners to carry compulsory first-party personal injury and property damage coverage as a condition of using the state's highways. At the same time, Michigan motorists had a "statutory entitlement" to protection against "excessive, inadequate or unfairly discriminatory rates." Although accepting the presumptive constitutional validity of the compulsory personal injury and

property damage protection schemes, the majority insisted that the No-Fault Act foundered on its glaring failure to provide motorists *procedural due process* with respect to defining for the motorist and providing him with prompt administrative review of pricing and rate-making determinations as well as nonrenewals and cancellations.

For purposes of "state action," if the conduct of a company-owned town, the modern corporation, a gargantuan labor union, the possessor of a near-exclusive franchise, and similar forms of association can be realistically viewed as a microcosm of the state itself, then what of the Billion Dollar Insurance Industry? Should it not be "constitutionalized" and subjected to the procedural due process and equal protection guarantees of the federal and state constitutions? In giving an emphatic affirmative to this pivotal question, Justice Williams lays down with high plausibility that, without the procedural safeguards, conspicuously lacking in the Michigan No-Fault Act, the statutory guarantee that rates would not be "excessive, inadequate or unfairly discriminatory," would be mere verbalism and empty exhortation. Since insurance companies were the instrument chosen by the state to impose No-Fault on Michigan motorists, there was a sufficiently close nexus between the state and the challenged action of the insurance companies—"an entire rate structure that was suspect"—to identify the program with the state and call for justifiable judicial veto under the 14th Amendment.

A Little Legislative Tinkering Will Not Save the Michigan No-Fault Law

We believe it will require more than a little patch work here and there to rescue the deeply flawed rate-making mechanisms of the Michigan Act consistently with the 14th Amendment. The jam pot for first-party carriers under No-Fault is their rate-setting and pricing policies about which they are silent and slippery. It is clear enough that they are against homogenizing risks.

While they don't believe in the common-law fault system that separates careful drivers from the speeders, tailgaters, light crashers and drunken drivers, they are infatuated with the golden difference between "preferred risks" and the unpreferred motorists who live in "red line," claim-prone areas or who belong to supposedly risky groups—a category that includes the young and old, blacks, actors, barbers, bartenders, sailors, soldiers, men with frivolous names like "Shorty," divorcees, doctors and clergymen (frowned upon as "preoccupied" drivers). This bifurcation in their favoring one class over the other has led to fast and loose discriminatory policies as to nonrenewals, cancellations, and sky-high surcharges in the assigned-risk category of castoffs.

The insurance companies, who paint themselves a bright red, have never had it so good in their largely unsupervised setting of premium differentials among their first-party insureds in the 16 or so states presently submitting to No-Fault strictures. Although the No-Fault carriers bewail their "underwriting losses," Immediate Past ATLA President Robert G. Begam uncloaked this disreputable deception, in his recent Senate testimony, as constituting fig leaf phrases to cover naked windfall profits, duplicity and avarice. He explained that although the carriers claim "staggering losses" every year, their net worth has grown steadily—from $11 billion in 1959 to $17 billion in 1969 to $25 billion in 1975.

That is why we believe that it will take more than a little tinkering to repair the glaring flaws in the rate-setting mechanism in the Michigan Act. Will the flush insurance companies submit to tighter, more stringent, fishbowl regulation of their discriminatory pricing, nonrenewal, and cancellation policies? Will they voluntarily remove their sliver spoons from the jam pot? Has any man with 5 aces ever called for a new deck?

Under constitutional government, courts have a nay-saying function. In speaking of the praiseworthy judicial veto by the Michigan court, ATLA President Tom H. Davis stated, "The decision is significant because Michigan's No-Fault law has been

held out as a model for national legislation. The national proposals also lack the safeguards found wanting in Michigan. The ruling shows that compulsory Federal No-Fault would be a tax on the American people levied by the unregulated insurance industry, not by government, for its own benefit. The Senate's No-Fault bill is loaded with care-packages for the insurance industry, 65 days of Christmas."

ATLA Members and Detroit attorneys Harry M. Philo and Sheldon L. Miller spearheaded the 6-year battle for plaintiffs that culminated in Michigan's prospective invalidation of its No-Fault Act. The *Detroit Legal News*, June 21, 1978, quotes Harry, who was chief counsel, as stating that "the Michigan law had forced 175,000 motorists into assigned-risk pools, denied vehicle registrations to 600,000 low-income vehicle owners and thrown another 600,000 into substandard companies with excessive rates . . . Since enactment of the law in 1973, rates have risen 50% for individual owners, while corporate owners of some 600,000 vehicles have had rate cuts of 50%."

The above synoptic sketch of the Michigan decision may indicate that it was a response to glaringly unfair practices in No-Fault rate-making, nonrenewals and cancellations and a redemption of our national ideals of procedural due process and equal protection.

Even better than the invalidation of constitutionally infirm No-Fault legislation is a threshold recall to perspective and a resulting refusal to enact it in the first place.

For then the community will be spared the social and legislative energies that must be spent in unscrambling the omelet or getting the mercury back in the bottle.

Against Stock Brokerage Firm—Fraudulent Securities Transaction—Brokerage Company Held Liable to Unsophisticated Married Couple for Fraud, Deceit, Intentional Infliction of Mental Suffering and Tort of "Outrage" in Manipulating Husband to Deceive Wife by Forging Her Name to Transfer

of More than $60,000 Worth of Stock, Their Life Savings, and Then Losing $30,000 of the Savings by Investment in High-Risk Options Trading—Damages—Punitive Damages Trial Judge Denies Brokerage Firm's Post-Trial Motions and Upholds Award of $1,030,000 Compensatory Damages to Wife (Who Suffered Complete Psychological Breakdown from Defendant's Investment Abuses) and $3 Million in Punitive Damages—Court Holds That the Combined $4 Million Award Was Produced, Not by Passion, Prejudice or Sympathy Generated for Victimized Husband and Wife, but Was "the Product of a Sense of Outrage and Indignation About the Callous and Cavalier Conduct of the Defendant's Agent (an Account Executive of Defendant's Firm) Acting in Complete Disregard of the Rules and Sensitivities of the Plaintiff Whose Emotional and Economic Security Was in His Hands."

Where brokerage firms, in flagrant disregard of their fiduciary responsibility to their known-to-be

APPENDIX D.

CATHERINE SHAVERS, et al,
Plaintiffs-Appellees,

vs. 57916

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, et al,
Defendants-Appellees,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al,
Defendants,

and

AETNA CASUALTY & SURETY COMPANY, et al,
Defendants-Appellants,

and

ALLSTATE INSURANCE COMPANY,
Defendant and Cross-Appellant.

CoA: #21238-9
LC: #73-248-068

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of December in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable THOMAS GILES KAVANAUGH, *Chief Justice*, G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., *Associate Justices*.

In this cause an application for rehearing is considered and, on order of the Court it is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of December in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ CORBIN R. DAVIS,
Deputy Clerk.

[SEAL]

APPENDIX E.

SHAVERS v ATTORNEY GENERAL

Opinion of the Court

Appeal from Wayne, Horace W. Gilmore, J. Submitted June 20, 1975, at Detroit. (Docket Nos. 21238-39, 22918). Decided November 5, 1975. Leave to appeal applied for.

Complaint by Catherine Shavers and others against the Attorney General, the Secretary of State, the Commissioner of Insurance, and several insurance companies, for a judgment declaring no-fault motor vehicle insurance legislation unconstitutional. Several of the defendants filed cross-complaints challenging certain provisions of the legislation. Declaratory judgment granted. The state officials and various insurance companies appeal. Plaintiffs and other insurance companies cross-appeal. Affirmed in part, reversed in part, vacated in part.

Lopatin, Miller, Bindes & Freedman, and *Philo, Maki, Cockrel, Robb, Spearman & Cooper,* for plaintiffs.

Frank J. Kelly, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harry G. Iwasko, Jr.,* Assistant Attorney General, for defendants Attorney General, Secretary of State, and Commissioner of Insurance.

Bodman, Longley, Bogle, Armstrong & Dahling (by *Theodore Souris, Carson C. Grunewald,* and *James R. Bushmann*), for defendant State Farm Mutual Automobile Insurance Company.

Dickinson, Wright, McKean & Cudlip (by *W. Gerald Warren, Dawn L. Phillips, Richard J. Meyers,* and *Robert L. Schwartz*), for defendant Allstate Insurance Company.

Downs & Edwards, for defendant League General Insurance Company.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *James D. Tracy, Michael J. McGuigan* and *Nancy C. Kurtz*), for defendants Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company.

Honigman, Miller, Schwartz & Cohn (by *Avern Cohn* and *Stanley Siegel*), for defendants Aetna Casualty & Surety Company, Home Indemnity Company, Hartford Accident & Indemnity Company, Travelers Indemnity Company and Continental Casualty Company.

Amici Curiae:

American Mutual Insurance Alliance, by *Foster, Lindemer, Swift & Collins, P. C. (Lawrence B. Lindemer* and *David W. McKeague).*

Central National Insurance Company, Universal Underwriters, Midwest Mutual Insurance Company, Balboa Insurance Company, Northland Insurance Company, Reserve Insurance Company, Progressive Casualty Company, and National Indemnity Insurance Company, by *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen (D. J. Watters* and *Charles A. Huckabay).*

Michigan Mutual Liability Company, by *Elijah G. Poxson, Jr.* and *James L. Schueler.*

KMW, Inc., by *Warner, Norcross & Judd (Wallson G. Knack* and *Peter L. Gustafson).*

Before: LESINSKI, C. J., and T. M. BURNS and QUINN, JJ.

LESINSKI, C. J. Plaintiffs, to test the constitutionality of 1972 PA 294; MCLA 500.3101, *et seq.;* MSA 24.13101, *et seq.,* ("No Fault") brought an action for a declaratory judgment in Wayne County Circuit Court. Defendants are three state officials and various insurance companies, some of whom filed cross-complaints challenging certain provisions of the no fault act. After complicated pretrial proceedings and a lengthy trial, the court issued its judgment. The holdings of the trial court in the declaratory judgment that was entered below are as follows:

> "NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECLARED that the following are the

rights and legal relationships of the interested parties herein:

"A. Insofar as raised by the issues delineated in the Court's Pretrial Statement and by those permitted to be raised during the course of trial, The Act, including Section 3109a thereof, does not violate any provision of the United States and Michigan Constitutions except as hereinafter sepecificaliy declared.

"B. Section 3101(2) of The Act, to the extent that it excludes from The Act vehicles which have two wheels or less violates the Equal Protection Clauses of the United States and Michigan Constitutions and, therefore, is declared to be void and of no force and effect.

"C. That portion of Section 3107(b) of The Act, insofar as it requires that the cost of replacement services be incurred and subsequently be reimbursed, is void and of no force and effect as violative of the Equal Protection Clauses of the United States and Michigan Constitutions. The cost of such replacement services must be paid, therefore, in the same manner as other personal protection insurance benefits are paid.

"D. The last sentence of Section 3109(3) of The Act, empowering the Commissioner of Insurance to approve deductible provisions in excess of $300.00 per accident for inclusion in insurance policies issued under The Act, violates Article III, Section 2 of the Michigan Constitution of 1963 as a delegation of legislative power without any standards whatever and, therefore, such sentence is void and of no force or effect.

"E. Section 3109(1) of The Act violates the Equal Protection Clauses of the United States and Michigan Constitutions and, therefore, is void and of no force and effect.

"F. Notwithstanding the provisions of Section 3135 of The Act, non-resident owners and occupants of a motor vehicle not registered in this State retain all tort rights of action possessed by them under Michigan law without regard to The Act unless such motor

vehicle has been operated in this State for an aggregate of more than 30 days in any calendar year or unless such owners or occupants are entitled to personal injury protection benefits provided by an insurance policy or other security providing such benefits under The Act.

"G. Property protection insurance required by The Act violates the Due Process and Equal Protection Clauses of the United States and Michigan Constitutions and, therefore, Sections 3121, 3123, 3125 and 3127 are void and of no force and effect in their entirety and, in addition, all other references to property protection insurance contained in Sections 3101 (1), 3145(2), 3148(1) and (2) and 3163(1) and (3), hereby are declared to be legally ineffectual. Such property protection insurance, therefore, shall not be deemed to be security required by Sections 3101(3) and (4) or 3135(2) of The Act and, consequently, tort liability for property damage is not abolished by Section 3135(2) of The Act. As a further consequence, the residual liability insurance coverage required by Section 3131 of The Act includes property damage liability.

"H. Section 3116 of The Act is construed to require subtraction from personal protection insurance benefits paid or payable under The Act only when like benefits have been recovered upon tort claims.

"I. Cross-Plaintiff State Farm's proposed interpretation of Section 3135, first submitted in its Motion for Partial Summary Judgment, and thereafter included as an issue for determination at the conclusion of this case, be and the same hereby is rejected and its Motion is denied.

"IT IS ORDERED, ADJUDGED AND DECLARED, further, that the provisions of The Act declared to be unconstitutional in the foregoing paragraphs are severable; that all such provisions are declared to be unconstitutional as of October 1, 1973 (the effective date of The Act); and that the balance of The Act is consonant with the original legislative intent."

Plaintiffs filed a motion for a new trial and for a partial rehearing. This motion was denied. The state officials and some of the insurance companies appealed. Plaintiffs and other insurance companies cross-appealed.

Defendants argued before the trial court that plaintiffs' action raised certain issues that were not properly before the court and that a ruling on these issues would be an advisory opinion.

The trial court view the question as one of standing. It found that the no fault act "has required and continues to require the expenditure of state funds", and therefore concluded that GCR 1963, 201.2(3) authorized plaintiffs to raise all possible infirmities in the Act. GCR 1963, 201.2(3) deals with real parties in interest[1] and states:

> "[A]n action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes, or in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside."

We disagree with the trial court's ruling that the court rule provides a basis for plaintiffs' suit. Plaintiffs are not concerned with the illegal expenditure of state funds. The court rule allows taxpayers aggrieved by the outlay of state funds to hurdle the traditional standing obstacle in taxpayers suits. We do not read it as permitting a group to challenge any legislation merely because of an incidental expenditure of state funds; almost all legislation involves some public spending. GCR 1963, 201.2(3) is inapplicable to this litigation.

We must determine whether GCR 1963, 521, Declaratory Judgments, authorized plaintiffs' action. Even though the court rule was intended to provide "the broadest type of declaratory judgment procedure", GCR 1963, 521, Official Committee Comment, the first subsection of the rule requires that there be

1. MCLA 600.2041(3); MSA 27A.2041(3) is identical.

"a case of actual controversy" before a court may issue a declaratory judgment. GCR 1963, 521.1, *Kuhn* v *East Detroit*, 50 Mich App 502; 213 NW2d 599 (1973), *Welfare Employees Union* v *Civil Service Comm*, 28 Mich App 343; 184 NW2d 247 (1970). A person seeking a declaratory judgment must show that the issues he raises have more than hypothetical importance to him. "It is familiar law that a party to whom a statute is inapplicable cannot question its constitutionality by seeking a declaration of rights." 1 Anderson, *Declaratory Judgments*, § 159, p 303. Plaintiffs have made no showing that the provisions of the no fault act dealt with in paragraphs C, D, E, F, and H of the court's judgment have or are likely to work to their disadvantage. A decision on the issues decided in those paragraphs was not "necessary to guide plaintiffs' future conduct in order to preserve [their] legal rights". *Welfare Employees Union v Civil Service Comm, supra*, 28 Mich App at 350. It was, therefore, inappropriate for the trial court to include paragraphs C, D, E, F, and H in its judgment. "It is not properly within our function to hypothesize particularized claims or to set up, speculatively, strawmen classes of persons who might claim to be disadvantaged in various ways by the classifications and provisions of the act." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 484; 208 NW2d 469 (1973), (concurring opinion of Justice LEVIN).

We do think, however, that because of the possibility of punishment by fine or imprisonment for non-compliance with the no fault act's security requirements, plaintiffs' action for a declaratory judgment on the issues found in paragraphs A and G of the court's judgment was appropriate. *Strager v Wayne Prosecuting Attorney*, 10 Mich App 166; 159 NW2d 175 (1968).

Plaintiffs also challenged the Legislature's decision not to include motorcycles in the no fault act's compulsory insurance requirements. Paragraph B of the judgment contains the trial court's ruling on this challenge. It was proper for the trial court to consider plaintiffs' claim that the act's compulsory insurance

requirements, since they did not extend to all types of motor vehicles, were invalid on equal protection grounds. Arguments going to the act's failure to extend no fault benefits to motorcyclists or someone injured by a motorcycle, however, should not have been heard. This sort of underinclusiveness claim, to be adequately considered, deserves the presentation only a member of the excluded class could make. Our review of Paragraph B will be limited to the argument properly before the trial court.

Paragraph I resolved a question of construction that was directly related to the issues in Paragraphs A and G, and the trial court appropriately ruled on this question.

Turning to the substance of plaintiffs' challenge, we must first decide whether the trial court utilized the correct standard of constitutional review. Plaintiffs claim that the trial court's application of traditional tests of due process and equal protection was error, and that the court should have subjected the act to "strict scrutiny" since the fundamental right to travel was involved. We find no infringement of plaintiffs' fundamental rights, and therefore agree with the trial court's refusal to employ a strict scrutiny test. Our recognizing that the automobile is a basic means of transportation today does not force us to conclude that legislation affecting automobile ownership and use constitutes an infringement upon the constitutional right to travel. Recent right to travel cases, which have dealt with statutes or regulations that penalized interstate migration, *e.g.*, *Shapiro* v *Thompson*, 394 US 618; 89 S Ct 1322; 22 L Ed 2d 600 (1969), *Dunn* v *Blumstein*, 405 US 330; 92 S Ct 955; 31 L Ed 2d 274 (1972), provide no basis to doubt that "[t]he use of the automobile as an instrument of transportation is peculiarly the subject of regulation". *Silver* v *Silver*, 280 US 117, 122; 50 S Ct 57, 58; 74 L Ed 221, 225 (1929). We are unwilling to extend the right to travel to include mere locomotion and thus severely limit legislative ability to respond to the many hazards present-day automobile operation presents. Rather than

"strict scrutiny", the more permissive traditional tests of due process and equal protection should apply to this legislation.

I. *Personal Protection Insurance*

The no fault act requires that all motor vehicles registered in Michigan carry personal protection insurance. Benefits, payable to an insured without regard to fault, cover medical expenses, wage losses and cost of replacement services that result from an automobile accident. Medical expenses include prosthetic devices and rehabilitation costs, wage reimbursement is limited to $1,000 a month for three years, and replacement services have a limit of $20 a day for three years. If death results, survivors may recover, in addition to $1,000 funeral and burial expenses, the amounts the deceased would have contributed to them, subject to a three-year $1,000 a month limit.

In providing for this rather extensive coverage, the no fault act abolishes most common law tort liability for automobile related personal injuries. Only if there is death, serious impairment of body function or permanent serious disfigurement can there be a recovery for non-economic losses resulting from the ownership, maintenance or use of an automobile. Economic loss that is in excess of the benefits recoverable under personal protection insurance may also be recoverable in a tort suit. Tort liability for intentionally caused harm remains.

The no fault act's provisions on compensation for accident victims serves the important social interest of lessening the tragic social and economic consequences that often accompany automobile mishaps. The route taken by the Legislature to achieve this permissible end, the institution of compulsory "no fault" insurance and the partial abolition of tort remedies, is not an unreasonable one. The trial court found that problems for both society and injured individuals existed with reparations for personal injuries under the tort system.

Common law remedies are not sacrosanct, *New York Central R Co* v *White*, 243 US 188; 37 S Ct 247; 61 L Ed 667 (1917),

Mackin v *Detroit-Timken Axle Co*, 187 Mich 8; 153 NW 49 (1915), Const 1963, Art 3, § 7, and their replacement by other means of redress is within the Legislature's prerogative. Plaintiffs have not shown that the no fault act's provisions for replacing tort liability for personal injury with recovery under compulsory first-party insurance violates due process.

Plaintiffs also argue vigorously that equal protection prohibits the difference in treatment the no fault act accords automobile accident victims and automobile tortfeasors. We disagree and find no invidious discrimination in the distinction made between automobile accidents and other instances of injury. There is certainly evidence that automobile accidents, by their frequency and severity, present a social evil unique at least by degree. "Courts should proceed cautiously and should defer to legislative judgments which are reasonable. The Legislature must be free to experiment without being required to attain 'mathematical nicety' in its formulation of remedies to social and economic problems." *Manistee Bank & Trust Co* v *McGowan*, 394 Mich 655, 680; 232 NW2d 636 (1975).

The trial court did find that the no fault act, in excluding motorcycles,[2] violated equal protection. Finding that motorcycles have consistently been classified as motor vehicles in this state and that their exclusion from the act did not have a reasonable relationship to the act's purpose, the trial court ruled that their exclusion lacked constitutional justification. The court accepted that cost was the main reason for not including motorcycles, but was unpersuaded that cost of coverage could justify the alleged under-inclusiveness of the act. We disagree. In reform legislation, the Legislature has wide latitude and may consider many variables in fashioning a solution. *Manistee Bank & Trust Co* v *McGowan, supra.* In the recent case of *Geduldig* v *Aiello*, 417 US 484; 94 S Ct 2485; 41 L Ed 2d 256 (1974), the United

2. " 'Motor vehicle' as used in this chapter means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels." MCLA 500.3101(2); MSA 24.1310(2).

States Supreme Court reviewed the exclusion of pregnancy-related disabilities in California's disability insurance coverage. The cost to contributing employees was given significant weight by the Court in upholding the Legislature's decision. In *Gauthier* v *Campbell, Wyant & Cannon Foundry Co*, 360 Mich 510; 104 NW2d 182 (1960), the Michigan Supreme Court upheld limitations on workman's compensation benefits allowable for death resulting from silicosis. "The legislative scheme as exemplified in the silicosis amendments included both monthly gradations and overall maximum limitations on benefits designed to lessen the *economic* impact on industry of accumulated exposure." 360 Mich at 523 (Emphasis added).

We refuse to consider irrational the Legislature's decision not to require no fault coverage for motorcycles because of the cost of insurance for those vehicles. In our delicate task of constitutional review we should not deprive the Legislature of its ability to consider the economic aspects when deciding how far to extend its reform. *Danridge* v *Williams*, 397 US 471; 90 S Ct 1153; 25 L Ed 2d 491 (1970).

II. *Property Protection Insurance*

The no fault act requires that automobile owners purchase property protection insurance. Like personal protection insurance, the required property insurance pays benefits without regard to fault. Property protection insurance, however, provides strictly third-party coverage. Even that coverage does not apply to vehicles and their contents unless the vehicle is properly parked at the time of the accident. The required property insurance provides coverage, up to $1,000,000, for damage to non-vehicular property of third parties and properly parked vehicles of third parties. All that remains of tort liability for property damage arising from the ownership, maintenance or use of an automobile is liability for intentionally caused harm.

Plaintiffs and cross-plaintiffs State Farm and Allstate attacked the property damage provisions on due process and equal pro-

tection grounds. The trial court found that the tort system did not present the same severe social problems, namely, inefficient and inequitable compensation, for property damage, that it did for personal injuries. In fact, the court, finding no evil to be eliminated by altering the scheme for property damage reparations, stated that "the challenged sections addressed no legitimate governmental interests". This led the court to conclude that the act's property damage provisions were invalid. Our analysis, though it has a different emphasis, leads us to the same conclusion.

Even under the minimum scrutiny test applied when innovative legislation is challenged on equal protection grounds, the legislation must be examined to see if its classifications are reasonable, and bear some reasonable relationship to the object of the legislation. While it is not the judiciary's task to second-guess legislative wisdom or to speculate on the possibility of more precise line-drawing by the Legislature, the decision on reasonableness cannot be avoided. "What is reasonable is in each instance a matter of judgment. In the final analysis, it is a value judgment and should be recognized as such." *Manistee Bank & Trust Co* v *McGowan, supra,* at 671.

Our judgment is that the distinction between moving vehicles and other types of property found in the no fault act's property damage provisions is an unreasonable one. The act is an attempt to assure prompt and adequate compensation for economic losses due to automobile accidents. To achieve this purpose, recovery for losses due to personal injury is had without regard to the negligence or "fault" of the injured party. Persons suffering certain types of property losses are reimbursed, under the act, without inquiry as to whether negligence caused their loss. Yet the act provides no means for compensating the owner of a vehicle damaged while it was being operated.

One reason advanced for the disparate treatment of certain property losses is that in accidents involving these two types of property, the moving vehicle is most often at fault; non-vehicular

property seldom causes damage to vehicles. But we fail to see how this observation serves as a basis of distinction when the aims of the act are considered. *Reich* v *State Highway Dept,* 386 Mich 617; 194 NW2d 700 (1972). It is also argued that the act, by excluding moving vehicles from the property protection coverage, places the burden of protecting the vehicle on the owner, who may still purchase optional collision insurance, and this provides a reasonable basis to set apart moving vehicles. But, we ask, why limit this burden to only vehicle owners, or why place the burden of protecting a parked car on someone other than its owner? If the answer is that non-vehicular property or parked cars seldom are at fault, we are again at an impasse.

Good reason can be offered, in light of the act's objective, for treating personal injury losses differently than property losses. The tort system operated at different levels of efficiency and adequacy of compensation for these types of claims. A valid distinction could also be made based upon the different burdens these types of losses placed on society and the individuals involved. But we fail to see any reasonable basis, in view of the act's purposes, that justifies the property damage classifications made by the act. We therefore hold that the property damage provisions are violative of equal protection.

In addressing plaintiffs' due process claims, we again turn to the legislative purpose. The legislative purpose, it appears, is to provide timely and adequate relief, at the lowest cost to the system and the individual, for economic losses arising out of motor vehicle mishaps. This purpose, as we have noted, is a permissible legislative goal. However, the means used to implement this purpose in the property sections of the act are arbitrary and do not bear a reasonable relation to the legislative object. *Grocers Dairy Co* v *Dept of Agriculture Director,* 377 Mich 71; 138 NW2d 767 (1966). Under the enactment, adequate and timely compensation for damage to the owner's vehicle will result only if the owner exercises his option to purchase insurance for his own vehicle. This option, by reducing the opportunities

for compensation for damage to the owner's vehicle, is an insufficient and arbitrary substitute for the prior tort system, which was found by the trial judge to be both accurate and timely.[3] This is not to say that a substitute means of compensation is mandatory in all legislative alterations of the common law.[4] We hold that to abolish an existing common law scheme in favor of a statutory scheme that does not achieve the legislative purpose is arbitrary and unreasonable.[5] The traditional tort remedy at least provided compensation for vehicle owners who could prove another's negligence, and there was, in addition, the option for self-insurance; under the act only the option for self-insurance remains. The legislative purpose of adequate and timely relief is not served by elimination of the tort system for owners' property claims.

The property protection provisions of the no fault act that we have held invalid are severable. The scheme for personal injury protection, which we uphold, can function independently, and

3. The optional collision insurance actually preserves fault analysis for those who wish to pay for it. The insurance available is on two forms: broad coverage and limited coverage. Broad coverage pays for all property damage to the vehicle in an accident in which the insured was *not at fault*. In cases in which the insured was *at fault*, there is a $100 deductible. Limited collision provides for payment of all damages to the car, less a $100 deductible, if the insured was *not at fault* and no payment if the insured was *at fault*. The effect of the statute, then, is to eliminate access to the tort system as a right and to substitute an option to purchase insurance that, in part, preserves traditional notions of fault. This substitution does not seem reasonable to us, for it does not advance the Legislature's purpose.

4. In the flux of events, the Legislature may determine that society is served by the elimination of legal recognition of a formerly protected interest. In *Bean* v *McFarland*, 280 Mich 19; 273 NW 332 (1937), the Court summarily upheld the legislative abolition of the tort of criminal conversation.

5. Since we are certain that the Legislature did not intend to deny legal recognition to the economic interest one has in his automobile, the abolition of a means of protecting this interest must be considered unreasonable. The lack of a substitute scheme for compensation prevents us from making an analogy to workmen's compensation.

under MCLA 8.5; MSA 2.216, we must find the invalid portion severable, rather than invalidate the entire act.

Paragraphs A, G and I of the Declaratory Judgment are affirmed; Paragraph B, insofar as it deals with a justicable issue, is reversed, and the remaining paragraphs are vacated. We award no costs, a public question being involved.

QUINN, J., concurred.

T. M. BURNS, J. *(concurring).* It is with reluctance that I join with my brothers in support of the opinion authored by Judge LESINSKI and concurred in by Judge QUINN. I cannot fault the fine reasoning of the majority in their resolution of the complex constitutional issues raised in this appeal. More attention, however, can and should be given to what appear to be the practical results of the no-fault system.

When the concept of no-fault insurance was first introduced, there was much enthusiasm about the idea. The thought of uncluttered courts and lower insurance premiums had a strong appeal. The momentum of the no-fault concept has been great, with numerous states having adopted some form of no-fault insurance at the present time, and even proposed Federal legislation designed to give effect to the no-fault theory on a national basis.

The no-fault act has been labelled social reform legislation. It was enacted to rectify the inequities of the traditional means of compensating victims of automobile accidents. The principal evil existing in the former system was that of complicated, lengthy and costly litigation, providing no certainty that the innocent victim of an accident would ever be compensated. To remedy these inequities, no-fault promised to provide a uniform system of compulsory insurance at a reasonable cost. For the good of all of us as potential accident victims, we became, by force of law, policy holders.

Now that we have experienced the realities of this legislation, however, the initial enthusiasm appears to have waned. It has

been suggested that not only have lower premiums not developed, but even higher premiums are now the rule. Insurance companies might be the real beneficiaries of this act. Uncertainty about the wisdom of the no-fault act, however, is not a proper legal basis for finding the legislation unconstitutional.

In short, what sounds so grand in theory may well not be so in reality. But as the history of constitutional challenges to the enactment of workmen's compensation statutes demonstrates, it is not enough to say that such legislation does *in fact* is as important a consideration in judging its validity as what it is *purported* to do. As stated by Justice Pitney:

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect." *Mountain Timber Co* v *State of Washington*, 243 US 219, 237; 37 S Ct 260; 61 L Ed 685 (1917).

I have noted what I think are some of the practical effects of our present statute. However, on this record, which was made in the relatively early days of the operative effect of the act, I am not able to conclude that the "practical operation and effect" of this legislation justifies a finding by this Court of unconstitutionality. On a more current record, a contrary conclusion may be justified.

APPENDIX F.

STATE OF MICHIGAN

In the Circuit Court for the County of Wayne

CATHERINE SHAVERS, et al.,
Plaintiffs,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, et al.,
Defendants.

Civil Action
No. 73-248-068-CZ

OPINION OF THE COURT

INTRODUCTORY STATEMENT

This is a taxpayers' suit seeking a declaratory judgment claiming that Act 294 of the Public Acts of 1972 (MCLA 500.3101, et seq; MSA 24.13101, et seq.), commonly known as the No-Fault Insurance Act is unconstitutional.

The matter has been before this Court since September of 1973. Many preliminary hearings were held, and plaintiffs' standing to maintain the action was challenged early in the proceedings by motions for accelerated and summary judgment. On Monday, September 24, 1973, the Court held that the case was properly brought and properly before the Court for decision. On September 26, 1973, the Court denied a preliminary injunction against the Act going into effect and it did go into effect on October 1, 1973, and has remained in effect since that time.

Four days were consumed in pre-trial conferences on November 19, 21, December 10 and 11, 1973. At the pre-trial con-

ferences, issues were developed for decision by the Court which will be considered in this opinion.

Several defendants object to the Court considering any issue except Issue No. I, dealing wtih compulsory insurance; Issue No. XI, dealing with property damage; and Issue No. XIII, dealing with tort immunity. These defendants claim that all other issues are not properly before the Court because: (a) they require an advisory opinion and do not arise out of a case or controversy properly before the Court for declaratory judgment; (b) they are not properly raised by the amended complaint and cross-complaints, and are not within the scope of the allegations of the amended complaint and cross-complaints; (c) none of the plaintiffs is discriminated against or affected by the claimed constitutional defects; and (d) none of the plaintiffs and cross-plaintiffs has standing to raise the issues.

At the pre-trial conference the Court ruled that all issues listed in the pre-trial statement, except Issue No. XII, were properly before the Court and ripe for adjudication.

Because the question of the power of the Court to decide all issues was preserved and has been raised again in final arguments and final briefs, the Court must consider these contentions.

These defendants contend that the Court is being asked to furnish an advisory opinion and that the Court is without power to do so. They claim that the ten weeks of trial of this matter was basically a vigorous dialogue between plaintiffs' attorneys and attorneys for the defendant through cross-examination of a variety of experts, interspersed with argument and assertions of fact more often than not confused with facts themselves. They claim that the hearing was not the kind of adjudicative hearing that the Michigan Supreme Court requires, relying on *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich. 441 (1973).

They claim, except for the issues which they admit are properly before the Court, that the plaintiffs are not real parties in interest and lack standing to raise the other issues; that no named

plaintiff has yet sustained any actual injury; and that only a class of persons allegedly discriminated against can complain that a statute violates equal protection. Defendants contend that plaintiffs' attempt, through the guise of a taxpayers' suit, to avoid the requirement of an actual controversy between actual parties, should be struck down, and that the Court in allowing the case to proceed under GCR (1963) 201.2(3), on September 24, 1973, was in error. They claim that to allow an attack on Public Act 294 through the guise of a taxpayers' suit would have an effect on opening every regulatory statute to challenge regardless of the of the interest of the plaintiff in the subject matter of regulation, provided the plaintiff was either a nonprofit corporation, organized for civic, protective and improvement purposes, or provided that five taxpayers in a single county join together.

The Court finds no reason to reverse its determination of September 24, 1973, reiterated in the pre-trial statement, that this case is properly before the Court.

GCR (1963) 201.2 and MCLA 600.2041 (MSA 27A 2041) are identical. They read as follows:

> "2. Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee and an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name with out joining with him the party for whose benefit the action was brought, and further
>
> "(1) An action upon the bond of any public officer required to give bond to the people of this state may be brought in the name of the person to whom the right thereon accrues; and
>
> "(2) an action upon any bond, contract, or undertaking lawfully made with an offer of this state or any governmental unit, including but not limited to a public, municipal, quasi-municipal, or governmental corporation, unincorporated board,

public body, or policital subdivsion, may be brought in the name of the state or any such unit for whose benefit the contract was made; and

"(3) an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic non-profit corporation organized for civic, protective, or improvement purposes, or in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside."

The basic question before the Court is that of standing. The statute and the rule reiterate the general proposition that every action shall be prosecuted in the name of the real party in interest, but subparagraph 3 is an exception. It authorizes actions such as this, if brought by five resident taxpayers challenging the constitutionality of a statute relating to the expenditure of state funds.

The substance of GCR 1963 201.2(3) was first placed in Michigan law by Public Act 4 of 1941, which remained until replaced in 1961 by the adoption of the Revised Judicature Act. The language of that Act (which was MSA 27.654(1) before its modification by the Revised Judicature Act) was as follows:

> "No action to prevent the illegal expenditures of state funds or to test the constitutionality of an act of the legislature relating thereto shall be dismissed on the ground that a proper party plaintiff is not before the Court, if such suit is brought either my a nonprofit corporation incorporated under the laws of this state for civic, protective or improvement purposes, or by not less than five residents of any county of this state, who are the owners of property assessed for direct taxation by the county in which they are resident . . ."

The Committee Commentary, GCR (1963) 201.2(3) is also of significance. It states:

> "The amended section . . . was added in 1941 and has been retained in more concise language in paragraph (3) of the rule."

This Commentary was adopted by the Michigan Supreme Court at the time of the adoption of the General Court Rules of 1963.

It is clear the new statute and rule were not intended to change the 1941 Act. Litigants who invoke the rule must be accorded the right to assert every conceivable constitutional challenge to a statute authorizing expenditure of state funds. Otherwise the rule would be a limitation rather than an expansion of the right to challenge a statute.

The question of standing was raised in two cases in Illinois and California, cited in oral argument, under statutes not greatly different from the statute and rule we consider here.

In *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521 (1952), an action brought to restrain disbursement of public moneys by officers of a state received under an act amending the motor vehicle law and for a determination of the constitutionality of the act. It was brought under Illinois Revised Statutes 1952, Chapter 102, paragraph 11 through 16, which provided that a suit to enjoin the disbursement of public funds by officers of the state government could be maintained either by the Attorney General or any citizen and taxpayer of the state.

To the defendant's contention that plaintiffs had no standing to challenge the statute, on the grounds that they were not nonresidents who could claim discrimination against themselves, the Court said on page 536 of 106 N. E. 2d:

> ". . . This contention is unsound. Where, as here, the suit is brought by a taxpayer under the statute governing injunctive proceedings to restrain disbursement of public monies . . ., we have held that the validity of a statute may be challenged by a taxpayer even though he is not, and does not claim to be, subject to the provisions except as a taxpayer . . ."

In *Blair* v. *Pitchess*, 5 Cal. 3d 258, 486 P. 2d 1242 (1971), a claim of lack of standing was also made. Plaintiffs brought their suit under Section 526(a) of the California Code of Civil

Procedure, which authorized an action by a resident-taxpayer to obtain an injunction restraining the illegal expenditure of public funds. It was claimed that plaintiffs were not affected by the statute and did not have standing. It was further claimed that there was not a true case or controversy because there were no allegations that plaintiffs were or might be parties to a claim and delivery action, the constitutionality of which was being challenged.

In discussing the matter, the Court pointed out, on page 267 of 5 Cal. 3d:

> ". . . The primary purpose of this statute . . . is to 'enable a large body of the citizenry to challenge governmental action, which would otherwise go unchallenged in the courts because of the standing requirement' . . ."

The Court further said on page 269:

> "Defendants argue nevertheless that, even if the instant action fulfills the requirements of Section 526(a), it was not properly cognizable by the trial court because it does not present a true case or controversy. They point out that there 'is no allegation that the plaintiffs were or may be parties to a claim and delivery action.' . . .
>
> ". . . we conclude that if an action meets the requirements of Section 526(a), it presents a true case or controversy. As we noted before, the primary purpose of Section 526(a) was to give a large body of citizens standing to challenge governmental actions. If we were to hold that such suits did not present a true case or controversy unless the plaintiff and defendant each had a special, personal interest in the outcome, we would drastically curtail their usefulness as a check on illegal government activity . . ."[1]

1. Defendants in argument have cited two Michigan cases, *Nichols* v. *State Administrative Board,* 338 Mich. 617 (1954) and *Menendez* v. *City of Detroit,* 337 Mich. 476 (1953). Neither case is on point. *Nichols* was an individual action by one taxpayer to seek a writ of prohibition staying proceedings in connection with the bonding for the Mackinac Bridge. It was not brought under the prior statute and was not the kind of suit contemplated by the rule and statute in question here. The same is true of *Menendez*. This was an action to

(Footnote continued on next page.)

It is clear that the statute and rule we are concerned with provides for an exception to the real party in interest rule. Its purpose is to allow five taxpayers to challenge the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto. As such, we deal here not with a real party in interest problem, but with the question of whether plaintiffs have standing to bring this action under the exception in the rule and statute.

The record in this case establishes that Act 294 has required and continues to require the expenditure of state funds. The testimony of Mr. Rowe establishes this without any doubt. It therefore appears clear that plaintiffs have standing to bring this action for declaratory judgment under GCR (1963) 521.

The function of a declaratory judgment action is set forth concisely in *Henry* v. *Henry,* 362 Mich. 85 (1960), at page 90, where the Court says, quoting from *Wolverine Mutual Motor Insurance Company* v. *Clark,* 277 Mich. 633:

> " 'But the rights to be determined by declaratory judgment or decree may be and perhaps usually are rights not in praesenti, but rights which are to come into full fruition or which will be fully vested at some future time. If uncertainties and controversies arise between interested parties as to what their respective rights will be when such rights accrue or become vested, and to avoid needless hazards or possible losses, it is necessary presently to have decision of such uncertain or controverted rights, then there is actual need of an justification for declaratory adjudication . . .' "

The rights of almost every citizen in Michigan are affected by the provisions of Act 294. There are more than five million automobile owners and drivers in Michigan, and nearly every

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restrain the issuance of automobile parking system revenue bonds brought by a taxpayer and his wife. It was not brought under the statute in question and did not seek the determination of the constitutionality of a statute.

citizen in the state is a pedestrian. Their rights vis-a-vis each other, in the event of an automobile accident, are regulated by this Act. Their rights must be clearly determined, and this Court has spent the better part of 8 months hearing testimony and argument, and in a protracted study of the law to determine the Act's effect, meaning and constitutionality.

The plaintiffs have properly invoked the statute and can assert every constitutional objection they have asserted. The case is ripe for decision upon the issues raised, and the Court proceeds by this opinion to decision.[2]

Fundamental Right to Travel

A basic issue in this case is whether Act 294 impinges upon a fundamental right to travel. Plaintiffs claim that they have shown Public Act 294 impinges upon the fundamental liberty of people to move freely, and that the State has shown no compelling State interest for enacting the statute. They further claim that even if a compelling state interest has been shown, the least onerous method of solution has not been used.

This issue was not raised at the pre-trial conference, but was injected into the case by plaintiffs' attorney in his opening statement, and a good portion of the testimony and briefing relates to it. Even though the issue was not raised at the pre-trial conference, the Court allowed it to be placed in the case and will consider this contention of plaintiffs.

2. Plaintiffs have contended that they could present to the Court testimony and argument on issues determined by the Michigan Supreme Court in *Advisory Opinion re Constitutionality of 1972 Act 294*, 389 Mich. 441 (1973). They claim that an advisory opinion is not binding as precedent and that this Court should reconsider the issues determined there.

Even though this Court recognizes that advisory opinions of the Supreme Court are not necessarily binding, it refused to hear any testimony or arguments on issues determined in the advisory opinion. This Court does not have the power to overrule an advisory opinion of the Supreme Court, and until the Supreme Court chooses to overrule its opinion, this Court is bound by it.

In analyzing the right to travel contention, we start with the elementary proposition that when the constitutionality of a statute is challenged on equal protection grounds and no fundamental rights are involved, the usual test is whether the statute is reasonably related to a permissible legislative end, and whether classifications set up by the statute arbitrarily discriminate against any person. The statute need not be drawn with absolute precision, as long as the classifications set up therein are not arbitrary.[3]

As was pointed out in *McGowan* v. *Maryland*, 336 U. S. 420, 81 S. Ct. 1101, 6 L Ed 2d 393 (1961) at page 426:

> ". . . A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it."

Furthermore, it is universally recognized that there is ordinarily a presumption of constitutionality of a statute, and normally the plaintiff must bear the burden of going forward and the burden of proof.

However, when a fundamental right is involved, a more stringent test of equal protection applies. There is no presumption of constitutionality, and the State must bear the burden of showing that there was a compelling state interest for the enactment of the statute, not merely a permissible goal. Furthermore, the State must show that the law adopted is the least onerous method of attacking the problem, and not merely rationally related to its solution.

Plaintiffs claim the fundamental right impinged upon by Act 294 is the right to travel. In considering this contention, the Court must first determine the extent and limits of the fundamental right to travel and ascertain whether it is applicable in this case. Before this analysis is made, no consideration may be given to the question of whether there was a compelling state interest for the enactment of Act 294, and whether the least onerous alternative was employed.

3. See *Dandridge* v. *Williams*, 397 U. S. 471, 25 L Ed 491 (1970).

It should be further noted that for the test to be applicable, a fundamental right must be involved and the exercise of that right must be deterred or penalized by the statute. See *Memorial Hospital* v. *Maricopa County*, 42 LW 4277; 39 L Ed 2d ..... (1974). In all cases where statutes have been struck down under this test, two more elements have been present. The express legislative purpose has been to deter the exercise of the right, and the interference has been direct and immediate.[4]

It is well established that one of the fundamental rights protected by the Constitution is the fundamental right to travel. This right, although not mentioned explicitly in the Constitution of the United States, has long been recognized as occupying a position fundamental to the concept of the Federal Union.[5]

The right of interstate travel has been repeatedly recognized as a basic constitutional freedom, and it extends likewise to international travel, as a right to leave the country. *Kent* v. *Dulles*, supra; *Aptheker* v. *Secretary of State*, supra; *Zemel* v. *Rusk*, 381 U. S. 1, 14 L Ed 2d 179 (1965).

The settled parameters of the right to travel are for migration, settlement, and free access, with the exception of international travel and return.[6] The basic rule is that a state may not exclude

4. *Williams* v. *Fears*, 179 U. S. 270, 45 L Ed 186 (1900); *Crandall* v. *Nevada*, 6 Wall 35, 18 L Ed 745 (1867); *Edwards* v. *California*, 314 U. S. 160, 86 L Ed 119 (1941); *Shapiro* v. *Thompson*, 394 U. S. 618, 22 L Ed 2d 600 (1969); *Gallogly* v. *Larsen*, 42 LW 3321 (1973); *Bates* v. *City of Little Rock*, 361 U. S. 516, 4 L Ed 2d 480 (1960).

5. See *United States* v. *Guest*, 383 U. S. 745, 16 L Ed 2d 239 (1966); *The Passenger Cases*, 48 U. S. (7 How.) 283, 12 L Ed 702 (1849); *Edwards* v. *California*, 314 U. S. 160, 86 L Ed 119 (1941); *Crandall* v. *Nevada*, 73 U. S. (6 Wall) 35 L Ed 2d 745 (1867); *Dunn* v. *Blumstein*, 405 U. S. 330, 31 L Ed 2d 274 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 22 L Ed 2d 600 (1868); *Memorial Hospital* v. *Maricopa County*, 39 L Ed 2d ....., 42 LW 4277 (1974); *Kent* v. *Dulles*, 357 U. S. 116, 2 L Ed 2d 1204 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 12 L Ed 2d 992 (1964).

6. See *Edwards* v. *California*, *supra*, 314 U. S. 160, 86 L Ed 119 (1941); *Shapiro* v. *Thompson*, *supra*, 394 U. S. 618, 22 L Ed

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persons from its boundaries without showing a compelling need for so doing.

Two of the most recent cases discussing the right are *Shapiro* v. *Thompson*, 394 U. S. 618, 22 L Ed 2d 600 (1968) and *Memorial Hospital* v. *Maricopa County*, 39 L Ed 2d ....., 42 LW 4277 (1974). In *Shapiro*, the Court held that the provisions of a statute requiring a person to have one year's residence in the state before becoming eligible for welfare assistance constituted a violation of a person's basic constitutional right to travel freely from one state to another. It further held that the classification was not shown to have promoted a compelling state interest and that, therefore, the Statute was unconstitutional.

The Court stated on page 638 the following:

> "Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional critreia do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause."[7]

(Footnote continued from preceding page.)

2d 600 (1968); *Gallogly* v. *Larsen*, *supra*, 42 LW 3321 (1973); *Memorial Hospital* v. *Maricopa County*, 42 LW 4277 (1974) 39 L Ed 2d .....

7. Attention is directed to Mr. Justice Stewart's concurring opinion in *Shapiro*, in which he pointed out that *Shapiro* simply recognized an established constitutional right and gives that right no less protection than the Constitution demands. He reminds us of *United States* v. *Guest*, 383 U. S. 745 at 757, where the Court said:

> "This constitutional right to travel from one state to another . . . has been firmly established and repeatedly recognized."

It should be noted that this case also pointed out that the constitutional right to travel freely from state to state finds constitutional protections quite independent of the Fourteenth Amendment.

Memorial Hospital v. *Maricopa County*, supra, dealt with the constitutionality of an Arizona statute requiring a year's residence in a county as a condition precedent for an indigent's receiving non-emergency hospitalization and medical care at the county's expense. The Court held that the durational residence requirement was in violation of the Equal Protection Clause, created an invidious classification that impinged upon the right of interstate travel by denying newcomers basic necessities of life, and that such a requirement, since it operated to penalize indigents from exercising their constitutional right of interstate migration, must be justified by a compelling state interest. The Court found no such compelling state interest.

The Court set forth a two-part test of whether a fundamental right is sufficiently burdened to warrant application of the compelling state interest test of constitutionality. The first question is whether the statutory enactment deterred migration and settlement, and the second is whether the requirement penalized the exercise of the right to travel.

The Court stated (page 4280) of 42 LW:

> "Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And governmental provisions or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements . . ."

Analyzing the meaning of the fundamental right to travel, the Court said on page 4881 and 4882 of 42 LW:

> "First, a state may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . So appellees must do more than show that denying free medical to new residents saves money. The conversation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement, which, in effect, severely penalizes exercise of the right to free migration and settlement in another state . . .

> "Second, to the extent the purpose of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible . . ."

In *Maricopa*, the court expressly declined to decide whether intrastate travel is subject to the same constitutional analysis and criteria as interstate travel.[8]

It appears to this Court, however, that to the extent a statute impinges on the right of intrastate travel, the same test should apply as would apply in the case of interstate travel. Particularly is this so in the State of Michigan where the Due Process and Equal Protection clauses of the Michigan Constitution[9] are as all-embracing as the Federal Constitution's Equal Protection and Due Process clauses.

The District Court for the Southern District of New York in *King* v. *New Rochelle Municipal Housing Authority*, 314 Fed. Supp. 427 (1970), discussing *Shapiro* v. *Thompson*, held that there appeared to be no valid basis for a distinction between interstate and intrastate travel. It pointed out that the right to travel does not depend upon the interstate nature of the travel, but rather upon constitutional concepts of personal liberty. It held, and this Court agrees, that these concepts are not dependent upon the crossing of state lines, for the right to travel freely must encompass movement within a state as well. For example, if the County of Wayne imposed a one-year residency requirement in Wayne County for admission to the Wayne County General Hospital, and forbade Michigan residents outside Wayne County from entering the hospital unless they had resided in Wayne County for one year, no one could seriously argue that such a requirement could stand. It appears clear that it would

8. On page 4279 of 42 LW the Court said:

> "Even were we to draw a constitutional distinction between interstate and intrastate travel, *a question we do not now consider*, such a distinction would not support the judgment of the Arizona Court in the case before us . . ." (Emphasis added.)

9. Article I, Sections 2 and 17—Constitution of Michigan (1963).

be struck down on the authority of *Shapiro* and *Maricopa* and under the Due Process and Equal Protection clauses of the Michigan Constitution.

The Court, in deciding whether Act 294 impinges upon the fundamental right to travel, will draw no distinction between interstate and intrastate travel. If the Act impinges upon the fundamental right to travel, it is immaterial whether this travel is interstate or intrastate. The basic question is whether traveling by automobile within or without the State of Michigan by Michigan residents and others, is a fundamental right protected by the cases cited.

The law also seems clear that when state action impinges upon a fundamental right to travel, the mere showing of a compelling state interest for the enactment of the statute is not alone sufficient to insure its constitutionality. The state is also required to show that the statute is the least burdensome alternative for accomplishing a permissible purpose.

In *Shapiro*, the Court stated that, although there was a compelling interest in preventing welfare fraud, less drastic means were available to minimize the hazard. The Court stated at page 637 of 394 U. S.:

> "Similarly there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard. Of course, a state has a valid interest in preventing fraud by any applicant, whether a newcomer or a long-time resident. It is not denied, however, that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperating among state welfare departments is common . . . As a matter of course, District (of Columbia) officials send a letter to the welfare authorities in the recipient's new community 'to request the information needed to continue assistance.' A like procedure would be an effective safeguard against the hazard of double payments. Since double payments can be presented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year."

And in *Maricopa*, on page 4283 of 42 LW, the Court stated:

> ". . . and, there is no need for the state to reply on the durational requirement as a safeguard against fraud when other mechanisms to serve that purpose are available which would have a less drastic impact on constitutionally protected interests . . ."

In summary the Court in *Maricopa* stated on page 4283:

> ". . . Appellees have not met their heavy burden of justification, nor demonstrated that the state, in pursuing legitimate objectives, has chosen means which do not necessarily impinge on constitutionally protected interests . . ."

The Michigan Supreme Court has also discussed the test in two fundamental rights cases, neither involving the right to travel. In *Governor* v. *State Treasurer* (1972) 389 Mich. 1[10] the Court considered the constitutionality of the current method of financing schools. The Court stated on page 25 of 389 Mich.:

> "Where fundamental interest is affected or a classification is inherently suspect, then it must appear that the classification under scrutiny is necessary for the achievement of a 'compelling state interest.' Furthermore, it must appear that the classification is specifically fashioned to further the purpose it is designed to accomplish. . . . And very importantly, there is an ultimate test. The state must prove there is no less onerous alternative by which its objectives may be achieved.

See also *Wilkins* v. *Ann Arbor City Clerk*, 384 Mich. 670 (1971).

The reasoning of the Michigan Supreme Court in *UAW* v. *Secretary of State*, 387 Mich. 506 (1972), is much like that in *Shapiro* and *Maricopa*. There, a statute allowing the suspension

10. This opinion was later vacated in 390 Mich. 389, but its discussion of a fundamental interest is nonetheless applicable to this case.

of registration of voters who did not vote biennially was attacked. The avowed purpose of the statute was to prevent voter fraud. The Court held there was a sufficient compelling state interest to prevent voter fraud, but stated on page 517:

> ". . . A statute that impinges on a preferred right in order to solve a legitimate and compelling governmental need must be precise in its regulation. . . . The state has the burden of demonstrating that the particular regulation is necessary and essential and not achievable by less drastic means . . ."

The Court went on to hold that since other statutes accomplish the purpose of preventing voter fraud adequately and with less interference with the fundamental right to vote, the provisions of the statute in question were too drastic, and it struck them down.

It thus appears that once a fundamental right is involved, the State, in addition to showing a compelling state interest for the enactment of the statute, must also show that the manner in which the problem is dealt with is the least onerous alternative or the least drastic means of attacking the problem. And this is equally true whether the burden is direct and severe, as in *Aptheker*, or secondary and relatively minor, as in *Maricopa*.

In analyzing whether this Court is dealing with a fundamental right that has been impinged upon by Act 294, it becomes apparent that two elements must be found before the fundamental right to travel has been interfered with. It must be shown, first, that the statute has, as a central purpose, the disruption of movement or free access to all areas into, within, or out of a state; and, second, that it directly and immediately interferes with such movement.

In view of this Court's earlier holding that intrastate travel is protected as well as interstate travel, the present statute must be analyzed to see if its central purpose is to disrupt movement within or into Michigan and to determine whether such resulting

interference was direct and immediate within the State or in preventing people from coming into the State.

Where interference is only incidental or remote, statutes have generally been upheld, and where the central purpose of the statute is permissible, and interference is only coincidental, they have usually been upheld. The central premise is that a state may not exclude persons from its boundaries without a compelling need.

No case so far has established a right to run errands, or to go on picnics without restriction or costs. What the cases have held is that the power of any state to interfere with travel and access must be narrowly limited because there is a fundamental right to move freely and have free access to any area.

It is plaintiffs' contention that when the owner of a motor vehicle is denied the use of that vehicle for transportation to industrial, commercial, educational, medical, religious, governmental and recreational centers, or to visit friends and family, there has been a burden placed upon the owner and his family's right to travel freely in Michigan. They argue that the right to such travel in a motor vehicle is a basic liberty, and that Act 294, by requiring no-fault insurance, impinges upon that right.

It is true that mandatory no-fault insurance will make it impossible for a certain number of people in Michigan to drive their automobiles. It is clearly established on this record that some people, because of poverty, cannot afford the insurance and, therefore, cannot use their cars. It is equally true that some of these people have need for an automobile and that there is inadequate public transportation available to them.

The fact that some, however, will be prevented from driving does not necessarily mean that the Constitutional right of travel as defined by the Supreme Court of the United States has been interfered with. There are, for example, many types of taxes and requirements in connection with the driving of an automobile that no one questions. The automobile must be

registered and for this a fee must be paid. A driver's license must be obtained, and for this a fee is charged. Gasoline taxes must be paid, and the former law required either liability insurance or the payment of a $45 fee as a condition of driving. Plaintiffs do not contend that law was unconstitutional and do not claim it impinged upon the fundamental right of travel. It is obvious that the mere operation of an automobile upon the streets and highways of Michigan involves many costs, some governmentally imposed but unchallenged, others privately imposed.

Act 294 does not significantly impinge upon or penalize the exercise of the right to settle and migrate, or to have free access to any area. There is no express legislative purpose to burden the right of travel. Any resultant interference is secondary, not direct or immediate. The effects are incidental to legislation dealing with the problem of providing a guarantee of quick and efficient compensation for those injured pursuant to the use of automobiles.

All Michigan cases involving states regulation of automobile use and ownership have unequivocally held automobile use to be a privilege, subject to public regulation under the police power.[11] Driving an automobile is necessary to many people, as plaintiffs contend. However, there is no showing on this record that it is necessary for migration and settlement. Nor does the inability to drive impede the more fundamental right to unfettered access.

Plaintiffs have cited to the Court two cases which they claim establish that the right to drive an automobile is encompassed within the fundamental right to travel. The first is *Miller* v. *Depuy*, 307 F Supp. 166 (1969) (D. C. Pennsylvania). That case was an action under the Civil Rights Act by a person whose driver's license had been suspended under the Pennsylvania Financial Responsibility Law. The Court held that the

11. *People* v. *Thompson*, 259 Mich. 109 (1932); *Bowerman* v. *Sheehan*, 242 Mich. 95 (1928); *People* v. *Schneider*, 139 Mich. 673 (1905).

Financial Responsibility Act violated equal protection and due process insofar as it required suspension of a driver's license and owner registration rights, without provision for review, because of failure to satisfy judgments based only on vicarious liability.[12]

On Page 172, the Court made the flat statement:

> "The right to drive an automobile is integrally bound up in the right to travel guaranteed by the Supreme Court's interpretation of the United States Constitution.

In no place, however, except for the gratuitous dictum cited above, did the Court analyze the fundamental right to travel to reach this conclusion. The Court was concerned with the constitutionality of the action depriving an owner with vicarious liability for an uncollected judgment, of his right to drive, after an administrative determination under the Financial Responsibility Act with no right to appeal. The case is not authority for the contention that the right to travel by automobile is part of the fundamental right to travel enunciated by the Supreme Court of the United States.

The other case plaintiffs have cited is *Wall* v. *King* (CA 1) 206 F 2d 878 (1953). This was an action against a state official for alleged deprivation of constitutional rights arising out of an alleged unjustified suspension of the driver's motor vehicle license. The Court of Appeals held that where the Registrar of Motor Vehicles unjustifiably revoked a drivers' license on the ground that the driver had operated the car after drinking intoxicating liquor without specifying the amount imbibed, there was no unconstitutional deprivation of life, liberty, or property with-

12. This case was affirmed in *Miller* v. *Anckaitis* (CA 3) 436 F 2d 115 (1970). The Court in affirming held the Pennsylvania motor vehicle safety responsibility provisions, as applied to a judgment debtor held vicariously liable for the omission of a subagent, unconstitutional as being in conflict with the Bankruptcy Act. At no place in the appellate opinion did the Court find a fundamental right to travel by automobile.

out due process, since the state legislature could constitutionally have provided for revocation of a license after one drink.

Plaintiffs rely upon the language found on page 882, where the Court said:

> "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law."

Wall v. *King* simply is not on point, and the quotation plaintiffs rely upon does not support their argument. The case involved the power of the state to suspend a license for improper drinking and did not deal with the fundamental right of travel we are concerned with in this case.[13]

There simply is no law that the Court has found that establishes the proposition that the fundamental right to travel includes the right to travel by automobile. Admittedly, there is necessity for the automobile in modern society. But this does not mean that the right to own and use one is a right protected by the Constitution as a fundamental right.

The Constitution protects the right to travel, but it does not guarantee a particular means of travel to every individual. It does not guarantee that all citizens will be financially able to travel wherever and whenever they desire. And, although it be a desirable objective, the Constitution does not forbid disparity in wealth.

Extending the fundamental right to travel to a fundamental right to drive a car is not logically compelled, nor is it a logical

13. There are many cases in which Financial Responsibility Acts have been attacked as denying fundamental due process. They are not on point in the issue here, but it should be noted that in every case the Court has upheld state Financial Responsibility Statutes. See *Commonwealth of Penn.* v. *Roeting*, 300 A 2d 125 (1973); *Rivas* v. *Cozens* (D. C., N. D. Calif.) 327 F Supp. 867 (1971); *Christenson* v. *Campbell* (D. C., Arizona) 347 F Supp. 82 (1972).

extension of the need to protect the basic right to travel and access protected by the Supreme Court. No one is excluded from the State of Michigan systematically by the absence of an automobile to drive.[14]

The Court concludes that Act 294 does not significantly impinge or penalize the right to travel as defined in the Constitution. The fundamental right to travel simply does not mean that one can travel wherever and whenever he wants to by the use of a motor vehicle.

The Court having concluded that Act 294 is not unconstitutionally infirm as a burden on the fundamental right to travel, the question of whether there was a compelling state interest for its enactment and, if there was, whether the least onerous solution was employed, need not be answered for the proper disposition of this case.

14. It should be noted that the Massachusetts Court in its no-fault case, *Pinnick* v. *Cleary*, 271 NE 2d 592 (1971) summarily rejected the right to travel contention. It stated on pages 600 and 601:

> ". . . Hence, we may summarily dispose of several of the plaintiff's arguments . . . There is no cause here for application of the 'compelling state interest' test, which is employed where a statute impairs fundamental rights protected by the Constitution. Nor, for the same reason, can the statute be struck down on the ground that it sweeps unnecessarily broadly in the face of a less restrictive alternative which would achieve the same ends . . . No argument has been presented to us to show that c.670 here in purpose or effect is discriminatory against interstate commerce; therefore the less restrictive alternative test is not applicable to it as a regulation affecting interstate commerce . . .
>
> "We conclude that the principles by which c.670 should be judged are those generally applied when economic and social regulations enacted under the police power are attacked as a violation of due process and equal protection of the laws . . ."

See also *Lasky* v. *State Farm Insurance Company, et al.*, ... Fla. ....., decided by the Supreme Court of Florida on April 17, 1974.

Necessity for Insurance and the Abolition of Certain Tort Rights

Two of the fundamental issue in this case relate to the power of the Legislature to require, as a condition precedent to the operation of a motor vehicle, the purchase of no-fault personal protection insurance, property protection insurance and residual liability insurance; and the power of the Legislature to abolish tort actions for body injury arising out of motor vehicle accidents which do not result in death, serious impairment of a body function, or permanent serious disfigurement.

Section 3101(1) of the Act provides:

> "The owner or registrant of a motor vehicle required to be registered in the state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle."

Section 3135(1) of the Act provides:

> "A person remains subject to tort liability for noneconomic loss caused by his ownership, maintenance or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement."

In addition, tort liability is retained for intentionally caused harm, and for allowable expenses, work loss, and survivor's loss as defined in Section 3107 to 3110 in excess of the daily, monthly or three-year limitations contained in those Sections.

It was stipulated at the Pre-Trial Conference that it is constitutional to require a person to carry public liability insurance. During the trial plaintiffs' attorney claimed that that was not the stipulation he agreed to, but that the stipulation he agreed to was that the former system in Michigan, which required either public liability insurance or the payment of $45 in the uninsured motorist fund, was constitutional.

The first question is whether the state can require a person to carry the insurance required in Act 294. This issue need not detain the Court for long. In *DeVries* v. *Secretary of State*, 329 Mich. 68 (1950), the Court upheld Michigan's Financial Responsibility Act.[15] Other financial responsibility acts have been sustained by the Supreme Court of the United States. See *Reitz* v. *Mealey*, 314 U. S. 33, 86 L Ed 21 (1941) and *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 7 L Ed 2d 641 (1962).

Plaintiffs agree that the former requirement of liability insurance or payment into the Secretary of State's uninsured motorist fund is constitutional, and it is logical to assume that if a state can require one to purchase insurance to protect unknown third parties, it can require an individual to purchase insurance to protect himself and others injured by him.

The state has a clear interest in protecting its citizens and preventing them from becoming wards of the state. Under Act 294, no resident of Michigan, regardless of fault, will become a ward of the state, as the result of an automobile accident, because of the mandatory first-party benefits he must purchase, nor will the family of an injured person be deprived of income or services formerly provided by him, nor will they be burdened by medical expenses. It thus appears clear that Act 294 merely expands upon the goals of the former Financial Responsibility

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15. The Court there said on pages 74 and 75:

> "Reasonable minds agree that the Legislature has the right under its police powers to control automobile traffic. One of the purposes of the Act in question is the regulation of such traffic by the control of those who may be licensed to drive a motor vehicle. In our opinion the Act in question is not unconstitutional."

Law.[16] Section 3101(1), requiring the purchase of no-fault insurance, is constitutional.[17]

Plaintiffs contend that the denial of tort recovery for non-economic loss, except for serious impairment of body function, permanent disfigurement, or death, violates both due process and equal protection. They also claim that the statute denies a fundamental right of redress for tortious injury; arbitrarily splits tort feasors into two classes, auto tort feasors and other tort feasors; denies free access to the courts; and takes away the right to trial by jury.

Similar contentions were made in other states challenging no-fault insurance statutes. In *Pinnick* v. *Clearly*, 271 NE 2d 592 (1971), the Massachusetts statute set a $2,000 threshold before a tort action could be maintained. The first $2,000 out-of-pocket expenses were paid on a first-party no-fault basis, and a tort action remained only if the out-of-pocket expenses exceed $2,000. It was claimed by plaintiff in that case that the elimination of damages for pain, suffering, and the like, unless the out-of-pocket expenses exceeded the $2,000 threshold, violated the due process and equal protection provisions of the Fourteenth Amendment.

The Court rejected plaintiff's claim. It held that a tort action for personal injuries sustained in an automobile accident was not a vested property right and it could be altered or abolished by statute. It further held that a constitutional provision guaranteeing a remedy for all injuries and wrongs is directed towards procedural rights and does not prohibit alterations of common law substantive rights.

16. See *Helring* v. *Davis*, 301 U. S. 619 (1937) where the Social Security Act was challenged. The Act required contributions to be made by the beneficiaries of the fund set up for the Act. Despite the fact the Act required employees to purchase future benefits for themselves, the Court upheld the Act as a constitutional method of advancing a governmental interest.

17. Property protection provisions are not considered here. They are discussed in a subsequent section of the opinion.

The Court said on page 599:

> "In arguing that the cause of action affected by c. 670 constitutes a vested property right, the plaintiff seems to ignore the distinction between a cause of action which has accrued and the expectation which every citizen has if a legal wrong should occur to find redress according to the rules of statutory and common law applicable at that time. The Legislature is admittedly restricted in the extent to which it can retroactively affect common law rights of redress which have already accrued. However, there is authority in abundance for the proposition that 'no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.' *New York Central Railroad* v. *White*, 243 U. S. 188 . . .; *Munn* v. *Illinois*, 94 U. S. 113 . . ."

The Court found that the statute altered prior legal rights to a much less drastic extent than did the statute involved in *New York Central Railroad* v. *White*, supra, and, although the statute may have deprived plaintiff of certain damages for pain and suffering, the exchange of rights involved with respect to the driver in an accident in which he was not negligent bore considerable resemblance to that affected by the statute in *White*. The Court found the statute did not violate due process requirements, and that the criteria chosen by the legislature were rationally related to its purpose of eliminating minor claims for pain and suffering and that some inequality in result is not enough to vitiate a legislative classification grounded on reason. It concluded that the statute violated no constitutional provisions, including the right to trial by jury, equal protection, due process and the right to free access to the courts.

In *Opinion of the Justices*, 304 A 2d 881 (1973), the Supreme Court of New Hampshire gave an advisory opinion on the constitutionality of the New Hampshire No-Fault Statute. That statute provided that a person could not seek compensation for pain and suffering in a tort action unless the reasonable and necessary expenses for his injury were in excess of $500. Many of the same arguments that have been made here were made

there. The Court held that the injured persons who did not meet the threshold were not left without a remedy, that the criterion of $500 out-of-pocket expenses was sufficiently rationally related to serious injury in general, and thereby to seriousness of pain and suffering, so as not to constitute an invidious discrimination. It sustained the Act.

The most recent consideration of no-fault statutes is that of the Supreme Court in Florida in *Lasky* v. *State Farm Insurance Company, et al,* ..... Fla. ....., decided on April 17, 1974. In that case the threshold provision required out-of-pocket expenses of more than $1,000 before an action could be maintained for pain and suffering. A many faceted attack upon the constitutionality of the statute, much as the attack in this case, was made, and, with one exception, the Court upheld the limitation on tort liability under the act.

The Court found, that by providing that suit could be brought to recover for pain and suffering after the threshold amount of reasonable and necessary medical expenses had been reached, the Legislature had made a reasonable classification. It found that due process was not offended, nor was equal protection. It further found that the threshold limitations were reasonably related to the legislative objectives, and that perfection is not required in classification. It held that some inequality in result is not enough to vitiate, on due process grounds, a legislative classification founded in reason. It did find a portion of the act unconstitutional, but the language of the section struck down was so different from that in the Michigan statute that the discussion of the Court is not applicable.

Based upon the reasoning of these cases and fundamental due process standards, it is clear that Act 294 in abolishing tort liability for noneconomic loss, except in cases of permanent disfigurement, serious impairment of body function, and death, does not offend the due process provisions of either the Fourteenth Amendment or the Michigan Constitution.

All acts of a state legislature are presumed to be constitutional until the contrary is shown. Justice Christency said in *Sears* v. *Cottrell,* 5 Mich. 251, at 259 (1858):

> ". . . The acts of a state legislature are presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provisions of the Constitution that they can be declared void for that reason. In cases of doubt every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act.
>
> "The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict . . ."

This statement of the law is equally applicable in this case, in view of the fact that the Court has rejected the fundamental right to travel argument.

The traditional due process test is twofold. In exercising its police power to promote the general welfare, the Legislature must, first, identify rationally a public evil justifying police power regulation and, second, the legislative response must be related reasonably to the purpose of correcting that evil. Two significant cases speak to this point.

In *Carolene Products Company* v. *Thompson,* 276 Mich 172 (1936), the Court said at page 178:

> "The primary determination of public need and character of remedy in the exercise of the police power is in the legislature. Unless the remedy is palpably unreasonable and arbitrary so as needlessly to invade property or personal rights as protected by the Constitution, the act must be sustained. The presumption favors validity and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted . . ."

In *Heart of Atlanta Motel Inc.* v. *United States,* 379 U. S. 241, 13 L Ed 2d 258 (1964), the Court said at page 258:

> ". . . The only questions are: (1) whether Congress has a rational basis for finding that racial discrimination by

motels affected commerce, and (2) if it had such a basis whether the means it selected to eliminate that evil are reasonable and appropriate . . ."[18]

The principle objectives sought to be accomplished by no-fault are to mitigate the economic and social consequences of body injury and deaths caused by motor vehicle accidents; to provide a source of funds promptly and certainly, without clogging court dockets; paying medical costs and wage losses caused by injuries or death without regard to fault; and to relieve the state from welfare and tax loss burden caused by automobile injuries and death, which destroy earning capacity and required overwhelming medical and rehabilitation expenses.

Great social problems are inherent in the automobile accident reparations tort system, and, although plaintiffs have questioned the validity of some of the data relating to the inadequacies of the system, the record reveals that the social problems perceived by the Legislature as justification for the reformation of the tort system, do in fact exist.

Prof. James MacGinnitie of the University of Michigan School of Business Administration, who was well qualified as an Actuary, testified at length on the automobile tort system. The basic thrust of his testimony was found in several exhibits prepared by him, which were Exhibits 2 through 10, 206, 207, 208, 209, 211 and 222.

18. Discussing the due process claim, the Court in *Pinnick* (supra) pointed out that the overall test under the due process class is whether the statute bears a relation to a permissible legislative objective, and whether it provides a reasonable substitute for pre-existing rights. It said on page 602 of 271 NE 2d:

> "In the instant case, however, the Legislature has not attempted to abolish the preexisting right of tort recovery and leave the automobile accident victim without redress. On the contrary . . . the statute has affected his substantial rights of recovery only in one respect and has simply altered his method of enforcing them in all others. Therefore, c.670 may be judged by the stricter test which the plaintiff urges upon us and for which there is considerable authority in workmen's compensation cases: whether the statute provides an adequate and reasonable substitute for preexisting rights . . ."

Through Exhibits 2 and 4, covering serious injuries suffered in automobile accident cases, as defined by the Department of Transportation, he dealt with an estimated 19,558 such cases in Michigan in 1972.[19]

His testimony showed that for cases of serious injuries under the tort system, 56.7% of persons received no compensation; 11.1% received less than 50% of economic loss, and 10.9% received 50% to 100% of economic loss. The balance of 20.3% received anywhere from 100% to 400$ of economic loss.

In a study of the same cases, he considered in Exhibits 3 and 5, the recovery of economic loss from all sources under the tort system. This showed that 9% of those injured received no recovery; 25.7% received up to 50% of their economic loss, and 28.9% received 50% to 100% of their economic loss. The balance of the group, some 36.4% received from 100% to 400% of their economic loss.

Other exhibits prepared by Prof. MacGinnitie showed that 3.7% recovered the economic loss which they did recover under the tort system in 30 days. A total of 7% recovered their loss in 60 days; 10.8% recovered their loss in 90 days, and only 46.1% recovered their loss in one year.

Other exhibits based upon the Department of Transportation Economic Consequence Study showed that the percentage of recovery by level of family income increased as the family income increased, and also increased as the level of education increased. For example, those with a family income of under $5,000 recovered 38% of their economic loss. Those with family incomes of $5,000 to $9,999 recovered 52% of their

19. It should be noted that Prof. MacGinnitie did not use the serious injury figures of the Department of State Police offered into evidence, but estimated the number so that he could use the Department of Transportation Study on Economic Consequence of Automobile Accidents. The use of the estimated number of 19,558 was based on the Department of Transportation's definition of serious cases, which was different from the definition used by the Michigan State Police.

economic loss, and those with income over $10,000 recovered 61% of their economic loss. By the same token, those who had only a grade school education recovered 24% of their economic loss. Those with a high school education recovered 53% of their economic loss, and those who had some college training recovered 70% of their economic loss.

He further projected through Exhibit 206, modified by Exhibit 211, and modified a second time by Exhibit 222, that under the tort system those suffering either death or any injury recovered a total of $204,064,000 in 1972 for body injury, and he projected that under the no-fault system, a similar group would have received $242,556,000. It should be noted that the figures in Exhibit 222 cover only recoveries for body injuries and uninsured motorists, and do not include first-party medical benefits under the tort system, or collision recovery under the tort system. The tort figures also do not include vehicle property damage.

The obvious points of Prof. Mac Ginnittie's testimony were that the tort system was defective in getting payment into the hands of injured persons promptly; that it was defective in compensating adequately for economic loss; and that in its operation, the uneducated and those lower on the economic scale received lesser protection than those better educated and those of higher economic circumstances.

Dean Lindsey Cowan of the Case-Western Reserve Law School, and Chairman of the Commission of the National Conference of Uniform State Laws, charged with drafting the Uniform Motor Vehicle Accident Reparations Act, testified on the necessity for no-fault legislation to meet the problem of the automobile accident reparation system. He asserted that an adequate no-fault system should require compulsory insurance; should provide reimbursement for all economic loss; should contain a substantial limitation on cancellations, and should have a substantial limitation on tort actions. He contended that cost and futility are basic reasons for placing a substantial limitation on tort. He contended that a no-fault system such as

Michigan's is necessary to prevent people from becoming public charges, because the present tort reparation ssytem is unfair and inequitable.

On cross-examination, he admitted that the no-fault sytem was different from the workmen's compensation system, in that the employee does not pay for workmen's compensation insurance, and every employee is covered regardless of his economic status. Further, he admitted that the employer-employee relationship is voluntary. Additionally, he conceded, as did other witnesses, that fault determinations were necessary in a no-fault system to determine cancellations and surcharges. Similar testimony relating to the necessity for fault determinations came from Rodney Wasmuth, Vice President of League General Insurance Company, and other witnesses who testified.

The net effect of the testimony of Prof. MacGinnitite, Dean Cowan, Robert Rowe, Deputy Insurance Commissioner of Michigan, and Philip Frangos of the office of the Secretary of State, was that there were great social problems in the automobile tort reparation system. They concluded that the Legislature did accomplish and solve many of the problems of the system, particularly delay in getting payments into the hands of injured persons. They stressed that tort fault determinations often were inhibited by antiquated doctrines of negligence and immunity, and that Act 294 provides collectible recovery for full economic loss.

Clearly, the Legislature identified rationally a public evil justifying police power regulation, and its legislative response was reasonably related to the purpose of correcting that evil.

It should be emphasized further that, contrary to provisions relating to abolition of property damage recovery, the Legislature provided adequate and reasonable alternatives through no-fault personal injury protection benefits in exchange for tort actions for noneconomic loss where the threshold of serious impairment of body function, permanent disfigurement, or death, was not met.

In abolishing tort recovery for noneconomic loss up to the threshold of Section 3135(1) of the Act, the statute does not offend the Due Process Clause of the Fourteenth Amendment of the Michigan Constitution.

Plaintiffs also contend that Act 294 violates the Equal Protection Clause of both the State and Federal Constitutions.

The basic test applied to due process issues is likewise applicable where legislative classification is attacked as a violation of equal protection. The Court must first determine whether the statute has a valid legislative purpose, and, second, whether the classifications under the statute are reasonably related to a legitimate public purpose.[20]

The principle was well stated in *Pinnick* v. *Cleary* (supra) where the Court said on page 609:

> "A principle analogous to that we applied to due process issues is likewise applicable where a legislative classification is attacked as a violation of equal protection: if the legislative difference in treatment is reasonably related to a legitimate public purpose, it is permissible . . .
>
> ". . . The same subsidiary presumption of constitutionality is present in this context also, as is the required use of any reasonably conceivable set of facts to justify the classification. . . . The equal protection clause thus limits legislative discretion in delineating classifications only to the extent of forbidding 'arbitrary or irrational' classifications . . . or discrimination which is invidious' . . ."

It is clear that there was a legitimate legislative purpose for the enactment of no-fault insurance. This was discussed earlier in this opinion, and the analysis there is applicable here.

One of plaintiffs' chief equal protection complaints is that the Legislature has not set up a natural class upon which to impose the "no-fault" scheme. They claim that the only natural classification is one of all tort feasors and all tort victims, and that those involved in automobile accidents cannot be singled out for

20. See *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528, 37 L Ed 2d 782 (1973).

special treatment because they are not a natural class distinguishable from other tort victims.

Adherence to equal protection standards does not require there be no classification in the application of statutes and ordinances, but only that the classification be based on natural distinguishing characteristics and bear a reasonable relation to the object of the legislation. If the classification is reasonable and not arbitrary, rests upon some valid distinction, and does not create an invidious discrimination, it must be upheld, if it has a substantial and fair relation to the objects of the legislation.[21]

The automobile tort reparation system has a long history of regulation separate from other personal injury torts. Financial responsibility laws have been enacted, guest passenger acts have been passed, and there are many other areas in which the automobile tort feasor has been treated differently from other tort feasors.

In *Naudzius* v. *Lahr*, 253 Mich. 216 (1931), the Court observed, in upholding the Guest Passenger Statute, on page 223:

> "It would be threshing old straw to discuss the accepted fact that the motor car has presented social, financial and governmental problems which justify the legislature in reasonably classifying it apart from other vehicles in the enactment of laws . . ."

Equal protection does not require that every class of tort be treated equally. It merely requires that there be no arbitrary discrimination in the manner in which automobile tort damages are handled. There is nothing in the Equal Protection Clause that requires a statute to be all-embracing in its treatment of tort. A state may properly direct its legislation against what it deems an existing evil without covering the whole field of pos-

21. See *Cook Coffee Company* v. *Village of Flushing*, 267 Mich. 131 (1934); *Local 1644* v. *Oakwood Hospital*, 367 Mich. 79 (1962).

sible abuses, so long as the classification is a reasonable one and is not arbitrary and discriminatory.[22]

It was proper for the Legislature to attack the problem of automobile accident reparations in the manner it did, so long as there was no discriminatory or arbitrary classification, and so long as it provided an alternate remedy for those injured in automobile accidents. As pointed out in *Pinnick* v. *Cleary* (supra) on page 610:

> ". . . It was clearly proper for the Legislature to conclude that the benefits of compensating an injured person for relatively minor pain and suffering, which as such entails no monetary loss, did not warrant continuation of the practice when balanced against the evils that it had spawned."

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland,* 366 U. S. 420, 6 L Ed 2d 393 (1961). Precision is not necessary. The keystone is arbitrariness, unreasonableness and invidious discrimination against a class.

No such discrimination exists here and therefore the Court holds that these Sections abolishing tort liability for personal injury and the providing therefore PIP benefits, except in cases of serious impairment of body function, permanent disfigurement or death, do not offend equal protection.

Plaintiffs next contend that Act 294 violates Article I, Section 13, of the Constitution of 1963, allowing anyone to prosecute or defend his own suit, either in pro per or by an attorney; Article I, Section 14, of the Michigan Constitution guaranteeing

22. See the language of *Whitney* v. *Cal.,* 274 U. S. 357, 71 L Ed 1095 (1927) where the Court said on page 370:

> "A statute does not violate the equal protection clause merely because it is not all-embracing. . . . A state may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses . . . It is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of legislative judgment and direction . . ."

the right to trial of jury in civil cases; and Article III, Section 7, which provides common law and statutory laws in force at the time of the adoption of the Constitution, shall remain in force until they expire by their own limitation or are changed, amended, or repealed.

The very language of the Constitution seems to refute this claim. Article III, Section 7, of the Michigan Constitution of 1963, provides as follows:

> "The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are changed, amended, or repealed."

This Section, which is substantially similar to language in the Michigan Constitution of 1908, clearly allows amendments of the law effective in the future.[23]

The contentions of plaintiffs were thoroughly reviewed in the original challenges to the workmen's compensation statute. In *New York Central Railroad* v. *White,* 243 U. S. 188, 61 L Ed 677 (1917), the Court upheld the concept of workmen's compensation and in discussing the problem considered here said on page 201 of 243 U. S.:

> ". . . It perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses, on the other hand, without setting up something adequate in their stead . . ."

The Court went on, however, to point out that there an adequate substitute was provided and therefore the Workmen's Compensation law did not offend the Constitution.

A claim similar to the one made in this case was made in *Naudius* v. *Lahr* (supra), challenging the Guest Passenger Statute. The Court pointed out on page 221:

23. Of course, the Legislature may not take away a cause of action which is already accrued, *Minty* v. *Board of State Auditors,* 336 Mich. 370 (1953).

> "A right of action for a tort to happen in the future is not property, and may be abrogated by the Legislature . . ."

In *Mackin* v. *Detroit Timkin Axle Company*, 187 Mich. 8 (1915), the Court reviewed the constitutionality of the statute which abolished workmen's compensation in Michigan and abolished tort liability, as well as trial by jury, in certain type of employer-employee cases. On page 13, the Court said:

> "It is to be recognized at the outset that workmen's compensation legislation of this class, based on the economic principle of trade risks in that personal injury losses incidental to industrial pursuits are . . . a part of the cost of production, works fundamental changes in the familiar principles underlying and governing the doctrine of liability for negligence, as heretofore applied to the relation of master and servant. But it by no means follows that this comparatively recent and radical legislation upon the subject, enacted to meet changed industrial conditions . . . violates spirit or letter of our Constitution. It can be assumed without misgiving, but there is no vested right in any remedy for a tort yet to happen which the Constitution protects . . ."

In other areas Michigan has by statute abolished common law causes of action, for example, the action for alienation of affections, criminal conversations, seduction of any person of the age of 18 years or more, and breach of contract to marry.[24]

The Michigan Constitution, the Michigan cases, and the Federal cases, clearly establish the right of the Legislature to change or abolish common-law rights and remedies.

Of course, a statute that abrogates tort rights must provide some adequate and reasonable substitute for them.[25]

Act 294 provides a substitute for the abolished tort actions for personal injury. It provides for personal protection benefits

24. See MCLA 600.2501; MSA 27A.2901.

25. See *New York Central Railroad* v. *White*, 243 U. S. 188, 61 L Ed 667 (1917); *Pinnick* v. *Cleary*, 271 NE 2d 592 (Mass. 1971).

for those who suffer injury up to the statutory threshold and retains a tort liability for injuries over the threshold.

These claims were also made in *Pinnick* (supra) and *Lasky* (supra). In *Pinnick* it was found that the probability of quick and efficient payment of personal injury benefits to a non-negligent injured motorist without the uncertainty of a tort proceeding was an adequate quid pro quo for the loss of tort remedies for pain and suffering up to the threshold figure. *Lasky* found that the personal injury aspects in a statute offered reasonable alternatives to the abrogated tort remedies up to threshold amounts where tort remedy remained. The Court said at pages 4 and 5 of the slip opinion:

> ". . . In exchange for his former right to damages for pain and suffering in the limited category of cases where such items are preempted by the Act, he receives not only a prompt recovery of his major, salient out-of-pocket losses . . . but also an immunity from being held liable for the pain and suffering of other parties to the accident if they should fall within this limited class where such items are not recoverable."

Act 294 provides PIP benefits for all of those who are denied a tort remedy for pain and suffering, and other noneconomic losses up to the threshold amount.[26] In providing this substitute for the tort right of pain and suffering, the Act meets all constitutional requirements, and does not offend those sections of the Constitution guaranteeing the right of jury trial; guaranteeing that the common law and statutory laws in force at the time of the adoption of the Constitution shall remain in force until they expire by their own limitation or are changed, amended or repealed; or guaranteeing the right of anyone to prosecute or defend his own suit either in prop per or by an attorney. Such an exchange of benefits is constitutional and offends no provi-

26. It should be noted that one group not covered are those nonresidents who are in the state less than 30 days in any one year, and are not insured by a certified insurer. See Section 3113(c).

sion of either the Michigan Constitution or the Fourteenth Amendment of the Federal Constitution.

Therefore, it follows that the abolition of tort rights for noneconomic loss for personal injury up to the threshold provided by the statute is valid and constitutional.

No-Fault Property Damage Provisions

Issue No. XI in the Pre-Trial Statement is stated as follows:

> "Do Sections 3121, 3123, 3125 and 3127 of the Act violate the Due Process (Article I, Section 17) and Equal Protection (Article I, Section 2) provisions of the Michigan Constitution of 1963 because they:
>
> "1. Have no rational basis for the ends achieved by the legislation insofar as they require property damage claims to be settled under the 'no fault' concept without any statistical or factual basis for bringing *property damage* under such concept.
>
> "2. Create two classes of injured persons in an automobile accident: (1) owners or operators of the vehicles that caused the damage without regard to fault and (2) other third persons who own property damaged in an automobile accident. These sections require a motor vehicle owner to insure the property of these third persons, who may be at fault, regardless of the motor vehicle owner's or operator's fault. Such classifications are unjust.
>
> "3. Establish an arbitrary limit of one million dollars on insurance benefits payable under a mandatory property protection policy without any rational basis for this classification and with a concomitant reduction in rights for those persons owning property valued in excess of the mandated amount.
>
> "4. Obliterate a present right of action without any countervailing or concomitant right or *quid pro quo*.
>
> "5. Treat the property of third persons injured by a motor vehicle accident and the property of a motor vehicle owner differently and without rational justification."

The net effect of these sections of the Statute is to provide property protection insurance on a no-fault basis up to one million dollars for each accident. Excluded from such coverage are vehicles designed for operation upon a public highway unless the vehicle is legally parked, contents of vehicles unless legally parked, and property damage arising when motor vehicle accidents occur out of the state. Tort liability is abrogated for all damages suffered to a vehicle and its contents when that vehicle is not legally parked, even though the owner and driver is totally free from fault, and the accident is caused solely by the negligence of another person. For an owner or operator of a vehicle to protect his own vehicle, it is necessary that he buy collision insurance, which is optional under the Act.

The statute provides up to one million dollars of no-fault indemnity protection against damage to some but not all property that may be damaged in an automobile crash. Owners of buildings and other real property, railroad trains, live stock and other animals, billboards, lighting fixtures, bridges, and the like, are entitled to one million dollars no-fault indemnity, but the owners of vehicles, unless legally parked, are entitled to no recovery except for intentionally caused harm.

The only evidence offered at trial in support of these property damage provisions came from Robert Rowe, Deputy Insurance Commissioner, and Dean Lindsey Cowan. Rowe testified that delays in settlement of property damage claims and the difficulty of fault determinations in cases of moving vehicles justified modification of the tort system as it related to property damage claims. Both Rowe and Cowan testified that the cost of insuring against damage to all property was too expensive to include all property damage in the no-fault system, or to leave intact traditional tort liability as mandatory third-party coverage under the Act.

Subsequent testimony in the case did not support Rowe's claim of delay in settlement of claims. Exhibit 65 was a time lag study of all Michigan bodily injury and uninsured motorist,

property damage and collision claims closed with final payment by State Farm Insurance during the months of July, August, and September of 1973. It showed that 65% of property damage liability and collision claims were paid within the calendar month in which the losses were reported; that almost 82% of property damage liability claims, and over 85% of collision claims were paid within the first calendar month in which they were reported; and that by the third calendar month in which the losses were reported, almost 92% of property damage liability claims and almost 96% of collision claims were paid. A similar exhibit covering Allstate's experience was Exhibit 164.

Testimony further showed that, even though fault determinations were not necessary in property damage claims, such investigations were conducted by insurance companies, even under no-fault, in all automobile crashes where bodily injury might result in residual liability claims. Even absent bodily injuries they were conducted for the purpose of determining applicability of deductibles and future surcharges on an insured's collision coverage.[27]

It was further testified that the cost of investigating fault in automobile property damage crashes is nominal. Witness Kinkade testified that State Farm's 1971 and 1972 allocated loss adjustment expense was only 3/10 of 1% of the company's earned premium for property damage cases.

It was also shown that the cost of collision coverage would increase with the elimination of tort liability, because with the elimination of tort liability, subrogation is no longer available to carriers to recoup losses paid under collision coverages. Estimates for the amount of the increase in collision rates range from 38% to 54%, depending upon the type of coverage.[28]

27. Richard Kinkade, State Farm General Claims Superintendent, testified that even under no-fault, it is necessary to determine liability for rating renewal premiums and for possible future liability for serious bodily injuries.

28. Mr. Rowe admitted collision rates would increase about 50%. Mr. Hatfield, AAA Actuary, testified its collision rates were
(Footnote continued on next page.)

In summary, the basic reasons stated as justification for the Act's treatment of property damage—delays in settlement, difficulty in fault determinations, and the high cost of fault determinations, do not withstand analysis.

As a result of these sections of the statute, Michigan motorists have only two practical choices. They may purchase collision coverage on their own vehicles at a much higher rate than heretofore, or they may forsake collision coverage and assume the full risk of loss of their property even when the loss may be the result of another motorist's negligence.

Testimony further showed that only 17% to 31% of former property damage liability claims will continue to be paid under property protection insurance or residual property damage insurance under no-fault, thus eliminating between 69% and 83% of all former property damage liability claims.[29]

Well over 90% of property damage liability claims presented no difficulty in determining liability, and in less than 1% was there a real dispute about liability.

In summary the testimony clearly established that the former system operated at high efficiency in resolving property damage disputes arising from automobile crashes.

Cross-plaintiffs and plaintiffs claim that the property damage provisions of the Act are invalid for the following reason: (1) They bear no reasonable relationship to a permissible legislative objective, but are instead arbitrary and unreasonable in violation of the State and Federal Due Process Clauses; (2) they classify the owners of damaged tangible property arbitrarily, are unreasonably and inviduously discriminatory, and bear no significant relationship to the purpose of the law in violation of the Equal Protection Clauses of the State and Federal Constitutions.

(Footnote continued from preceding page.)
increased 38%, and Mr. Hillhouse, St. Farm's Actuary, testified that its collision rates had increased 41% to 54%.

29. See testimony of Byron Hatfield and Jerry Hillhouse.

It is clear that the property damage provisions of Act 294 deprive owners of moving vehicles of their property rights by the abrogation of all tort remedies against negligent tort feasors, without providing a substitute remedy. Such abrogation of tort remedies without substitute remedy cannot stand under the Due Process Clauses unless there be found some interest in society to be served, such as the elimination of an evil menacing the health, safety, morals or welfare of the people, and unless the means selected to eliminate that evil are reasonable and appropriate.[30]

Property rights are not subject to loss by arbitrary action of the Legislature.

The traditional test was stated in *Heart of Atlanta Motel, Inc.*, v. *United States*, 379 U. S. 241, 13 L Ed 2d 58 (1964), where the plaintiff questioned the exercise of the commerce power by Congress in prohibiting racial discrimination by motels. The Court said (page 258):

> ". . . The only questions are: (1) whether Congress has a rational basis for finding the racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. . ."

Grocers Dairy Company v. *Department of Agriculture*, 377 Mich. 71 (1966) is a case in which the Legislature prohibited

30. See *Kluger* v. *White* (Fla.) 281 So 2d (1973) holding unconstitutional Florida's no-fault statute on property damage, while the Court said on page 4:

> "We hold, therefore, that where a right of access to the courts for redress of a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the state . . ., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people . . . to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such rights, and no alternative method of meeting such public necessity can be shown."

the sale of milk in one gallon containers. The court concluded that one gallon containers did not present any health hazard to differentiate them from other containers, and that such containers would not confuse or defraud the public. The Court stated (page 76):

> "The power of the Legislature to regulate the production and sale of milk is not in dispute, but the police power of regulation does not include the absolute prohibition of trade in useful and harmless articles of commerce . . .
>
> "The primary determination of public need and character of the remedy in the exercise of the police power is in the Legislature, and its statutes must be sustained unless the remedy is palpably unreasonable and arbitrary, so as needlessly to invade property of the person's rights as protected by the Constitution . . ."

On pages 78 and 79 the Court said:

> "A reading of the entire record fails to convince this Court that appellants' . . . gallon containers present a health hazard any different from the . . . smaller sizes . . . permitted by law. Nor does the record contain evidence that the use of the gallon measure . . . might confuse and defraud the public. On the contrary, the evidence demands a conclusion that there is no basis in public health, safety, or welfare for denying the appellant the right to sell milk in gallon containers.
>
> "The regulations of [the statute] as applied to plaintiff are unreasonably and capricious, and lead to the inevitable conclusion that there is no reasonable relationship between the public purpose and the remedy adopted."

The evidence here showed that property damage claims did not clog court dockets, that recovery of damages were prompt, and that there was no artificial build-up of damages, that there was no duplication of loss benefits, and that payments of losses were generally accurate and were neither excessive nor inadequate. In short, the clear evidence was that the tort property damage indemnification system was working efficiently, and that

there was no social objective to be served by abrogating tort rights of owners of property damaged by negligent tort feasors.

The Court concludes that such deprivation of property rights of owners of damaged motor vehicles who received no benefits under Act 294 is an unreasonable exercise of legislative power, bearing no reasonable relationship to any societal interest. It arbitrarily deprives owners of property of any remedy for loss without any reasonable basis.

In view of the fact the legislative object is invalid and the legislation arbitrarily deprives owners of property without due process, there is no need to discuss whether the method of regulation bears a reasonable relationship to statutory objectives.

It is equally clear that these provisions offend the Equal Protection Clauses of both the Federal and State Constitution.

To meet equal protection standards, the Courts must first identify a legitimate state interest to which the classification is related, and the classification must be rationally related to achieve the purposes of the statute. Such classification cannot be arbitrary.

As pointed out earlier, equal protection does not proscribe classification, but the classification must be based on rational distinctions and bear a reasonable relationship to the objects of the Legislation.[31]

Not only do the challenged sections address no legitimate governmental interest, the classification is arbitrary and unreasonable. There is no testimony in the record to support any other conclusion.

Denying motorists both no-fault property protection benefits and tort remedies, while bestowing as much as one million dollars in benefits upon other automobile crash victims, who might be just as likely to have negligently caused the crash, is

31. *Cook Coffee Company* v. *Village of Flushing*, 267 Mich. 131 (1934); *Palmer Park Theatre Company* v. *City of Highland Park*, 362 Mich. 326 (1961); and *Local 1644* v. *Oakwood Hospital*, 367 Mich. 79 (1962).

arbitrary, discriminatory, and unreasonable. There is no rational basis for the disparate treatment of automobile crash victims whose property is damaged.

Therefore, for the reasons given, Sections 3121, 3123, 3125, 3127, violate both the Due Process and Equal Protection Clauses of the Federal and State Constitutions and are unconstitutional.

In reaching this conclusion the Court has considered State Farm's contention that Section 3135(2) should be interpreted to abolish tort liability only with respect to those personal injuries and that property damage for which no-fault security is required by the Act.

To understand its contention, the Court must look at the language of 3531(2). It provides:

> "Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance or use within this state of a motor vehicle with respect to the security required by subsections (3) and (4) of section 3101 was in effect is abolished except as to :
>
> "(a) . . .
>
> "(b) . . .
>
> "(c) . . ."

State Farm contends that the clause referring to the security required by the act "with respect to which the security required . . ." should be read to modify the subject "tort liability" rather than the immediately preceding term "motor vehicle." It claims that if such an interpretation is placed upon this language, tort rights and liabilities would continue to exist, absent the quid pro quo of no-fault benefits. It claims that such an interpretation will obviate the necessity of a determination of unconstitutionality, and that such an interpretation finds support in logic.

The effect of the interpretation claimed would allow the continued assertion of tort rights for damage to moving vehicles and their contents, and remove from the tort system only those property damage claims covered by no-fault.

In support of its argument State Farm claims that the Court must favor statutory interpretation which gives rational meaning to all sections of the Act, to produce a harmonious and consistent statute. It also claims that such interpretation would avoid the necessity of a determination of the constitutionality of the property damage section, and that the Court is mandated to give the statute a construction which will avoid unconstitutionality if such a construction reasonably can be placed upon the statute as a whole. [32]

The Court agrees that where possible it must give language of a statute an interpretation that harmonizes with the entire act and an interpretation that makes the statute constitutional. By the same token, a Court may not give a strained construction to a statute, contrary to the legislative intent, for the mere purpose of upholding its provisions.

It appears to the Court that the proposed interpretation of State Farm is contrary to the legislative intent and the clear language of Section 3135.

The realistic construction of this section requires the normal use of words, and such normal use requires that the phrase "with respect to which the security required . . ." modify "of a motor vehicle" rather than the phrase "tort liability, since the phrase in question directly follows the words "motor vehicle" and not "tort liability."

In *Haveman* v. *Kent County Road Commission*, 356 Mich. 11 (1959), the Court sated [sic] on page 18:

> "A modifying clause is confined to the last antecedent unless there is something in the subject matter of dominant purpose which requires a different interpretation."

To read the language in the manner contended by State Farm would strain the meaning of the section, and misconstrue the clear legislative intent. It is clear that the Legislature in enacting

32. *Dussia* v. *Monroe County Employees' Retirement System*, 386 Mich. 244 (1971); *Smith* v. *Jones*, 15 Mich. 281 (1867).

Section 3135 did not intend to retain tort liability abolished under the property damage sections.

For the reasons given, the Court rejects State Farm's proposed interpretation of Section 3135(2).

Exclusion of Motorcycles

Issue No. II set forth in the Pre-Trial Statement is as follows:

> "Is the distinction in Section 3101(2) between two wheeled motor vehicles and other motor vehicles constitutionally infirm"?

Section 3101(2) defines motor vehicle as follows:

> "(2) 'Motor vehicle' as used in this chapter means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels."

This definition excludes a major class of vehicles always previously regarded as motor vehicles under the Michigan law, namely, motorcycles.[33]

The exclusion of motorcycles creates a separate classification of motor vehicles designed for operation upon the public highways. This classification is challenged under the Equal Protection Clause of the 14th Amendment, and Article I, Section 2, of the Michigan Constitution of 1963.

For such a classification to be valid under the police power, there must be a legitimate state interest to which the classification may be related, and the classification must be rationally related to achieve the purposes of the statute. *Jefferson* v. *Hackney*, 406 U. S. 535, 32 L Ed 2d 285 (1972); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

Michigan case law contains numerous statements of the Equal Protection test. The language of *Cook Coffee Company* v.

33. A motorcycle has been defined in Michigan law as a motor vehicle. MCLA 257.31, MSA 9.1831, *People* v. *Smith*, 156 Mich. 173, 175 (1909); *Motorcycle Dealers' Association* v. *Detroit*, 38 Mich. App. 564, 567 (1972).

Village of Flushing, 267 Mich. 131, 134 (1934), is applicable here:

> "These constitutional provisions . . . do not mean that there can be no classification in the application of statutes or ordinances, but only that the classification must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the legislation.[34]

The purposes of Act 294 are to mitigate the social and economical consequences of body injury and death caused by motor vehicle crashes; to provide funds for victims promptly and with certainty without clogging court dockets; to pay all medical costs and most wage loss caused by such injuries without regard to fault, and to relieve the State from the welfare and tax loss burden caused by such injuries and death which destroy earning capacity and often require overwhelming medical and rehabilitation expenses.

Testimony at trial indicated that the basic reason for excluding motorcycles from coverage under the Act was that no-fault insurance for motorcycles would be very expensive in view of the high propensity of such vehicles for accidents, particularly one-party accidents.[35]

There are approximately 5 million passenger and commercial vehicles on the roads of Michigan, and, in addition, 262,000 registered motorcycles and motor scooters. During the year 1972, these motorcycles were involved in 8,501 accidents, and of these 3,300 or 38.8% involved only the motorcycle, or were one-vehicle accidents. These one-vehicle motorcycle accidents resulted in 56 deaths, representing 32.9% of all people killed in motorcycle accidents.

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34. See also *Beauty Building Construction Corporation* v. *City of Warren*, 375 Mich. 229 (1965); *Palmer Park Theatre Company* v. *City of Highland Park*, 362 Mich. 326 (1960); *Local 1644* v. *Oakwood Hospital*, 367 Mich. 79 (1962).

35. This was emphasized in the testimony of Robert Rowe, Deputy Insurance Commissioner.

In spite of the high cost of motorcycle no-fault insurance and the high incidence of one-party motorcycle injuries, Dean Lindsey Cowan of the Case-Western Reserve Law School, a defense witness, testified that there was no reason for excluding motorcycles from coverage under no-fault insurance.

It is clear that the problems of litigation arising from accidents of motor vehicles and liability thereof are not limited to motor vehicles of more than two wheels. The chief difference between the vehicles relates to size and the fact that in the same accident situation, the driver of a motorcycle is likely to draw more benefits.

The classification of two-wheeled motorcycles creates a discrimination against a class, not based upon reasons related to the stated purpose of the Act, which is to regulate the insurance of motor vehicles, but simply upon the fact that the members of the class may draw more benefits proportionately than the operators of other more substantial vehicles. In fact, as pointed out above, trial testimony indicated that the basic reason for excluding motorcycles was only the cost one, because of their high propensity for accidents, particularly one-party accidents.

The avoidance of higher costs is not a purpose reasonably related to the legislative goals of Act 294. There is in fact no rational distinction between motorcycles and other motor vehicles.

In addition, a class of pedestrians is arbitrarily discriminated against. Consider the plight of the pedestrian who has the misfortune to be struck by a two-wheeled motor vehicle. This pedestrian's remedy is totally different from that of a pedestrian struck by a vehicle of three or more wheels. *Grace* v. *Howlett*, 51 Ill. 2d 478, 283 NE 2d 474 (1972), the Illinois no-fault decision, discusses this problem in great detail. There, the statute covered only private passenger vehicles and excluded all others. The Court stated on pages 478 and 479 of 283 NE 2d:

> "The effect of the classification created by Article XXXV may be visualized if we assume that two pedestrians each

suffer an identical injury when struck by a negligently operated automobile: A, who is struck by a car which is included within the first party coverage category of Section 600 gets prompt payment of his medical and other expenses as provided by Section 600; B, who is struck by a car which is not included within the enumerated category in Section 600 does not receive any payment under Section 600 . . .

"There are many purposes for which the obvious difference between private passenger automobiles, buses, taxicabs, and other vehicles would justify this legislative treatment. *But the determination of the amount to be recovered by persons by those vehicles and the condition governing that recovery is not one of those purposes* . . . To the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of Section 22 of Article IV . . ." (Emphasis added.)

It appears to the Court that the reasoning of the Illinois Court is persuasive and correct, as applied to Section 3101(2) of Act 294.[36]

Creation of this discriminatory classification between victims also violates the requirements of equal protection, as it is not related to any of the legislative purposes of Act 294. It actually has an effect contrary to the public interest and the legislative goals.

In summary, the classification of motorcycles not only discriminates against a class of owners and drivers for reasons unrelated to the stated purposes of the Act, but also discriminates against a class of pedestrians and others who are not owners and operators of vehicles. There appears to be no constitutional justification for these discriminations, and therefore the

36. It should also be noted that the plight of the pedestrian is entirely different if he is struck by an uninsured motorist operating a motor vehicle of more than two wheels. If the pedestrian does not have insurance himself he can then claim against the Motor Accident Vehicle Claims Fund. The pedestrian who does not have insurance and is struck by a two-wheeled motorcycle has no such coverage. He has only the traditional tort remedy against the motorcycle driver. See Section 3172 of the Act.

Court holds that Section 3101(2) of the Act is unconstitutional insofar as it excludes two-wheeled vehicles from coverage under the Act.

Constitutionality of Criminal Penalties

Issue No. IV in the Pre-Trial Statement raises the question of whether it is constitutional for the Legislature to assess criminal penalties against those who operate or permit to be operated a vehicle upon the public highway without the security required by this Statute.

The specific section involved is MCLA 500.3102(2) which states:

> "(2) An owner or registrant of a motor vehicle with respect to which security is required who operates the motor vehicle or permits it to be operated upon a public highway in this state without having in full force and effect security complying with this section or section 3101 is guilty of a misdemeanor. Any other person who operates a motor vehicle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall have his license, and, if an owner or registrant, his registration revoked and may be fined not less than $100 nor more than $500 or imprisoned for not more than one year or both."

As the Court held at pre-trial conference, there are no mandatory fines nor any mandatory jail sentences under this section. Further, there is no factual question for adjudication of this issue.

Many Michigan statutes regulating the operation of motor vehicles on the public roads have criminal penalties.[37]

37. MCLA 257.904 provides for criminal penalties for driving without an operator's license; MCLA 257.1104 formerly provided that the failure of an operator of a vehicle to provide evidence of

(Footnote continued on next page.)

In general, the power to make and enforce laws for the public health, safety and welfare is one left to the states by the Federal Constitution. This general residual power, however, is subject to Constitutional restrictions against ex post facto laws, bills of attainder and laws prescribing cruel and unusual punishment or excessive fines. In addition, all legislative acts of the State must conform to the requirements of the due process and equal protection clauses of the Fourteenth Amendment.

If an act is one which the Legislature is validly empowered to pass, it can be enforced by reasonable criminal penalties that are not excessively harsh, in light of the purpose and importance of the Act. These general principles are summarized in 14 Am Jur Sec 507, pages 155 and 156, and quoted with approval in *Chandler* v. *Johnson,* 133 F 2d 139, page 142 (1943) as follows:

> "Subject only to constitutional limitations, such as those prohibiting cruel and unusual punishment, excessive fines, the enactment of ex post facto laws, the imposition of double jeopardy, and those granting equal protection of the law, etc., the legislature may fix the punishment for crimes as it sees fit. Its power is practically unlimited . . . so long as it does not in so doing infringe or violate any of the guarantees secured to all citizens by the Constitution. Its power is not a special grant or limited authority but a part of the legislative or soverign power of the state . . ."

It is clear that the power of the Legislature includes the power to pass an act to impose criminal liability for conduct which previously carried only civil liability. The Michigan Supreme Court accepted this principle regarding an act describing negligent homicide with a motor vehicle and prescribing criminal penalties in addition to the normal tort liability. In *People* v.

(Footnote continued from preceding page.)
insurance or payment of the uninsured motorist fee of the Michigan Vehicle Accident Claims Act within 72 hours or request for such evidence by peace officer was a misdemeanor.

McMurchy, 249 Mich. 147, 228 NW 723 (1930), the Court said on page 162:

> "The law is well settled that the Legislature, in the exercise of its police power in order to preserve the health, morals, and safety, may constitute something to be a crime that theretofore was not criminal. It may impose a criminal responsibility for a tort that theretofore carried with it only civil liability."

Regulatory statutes imposing criminal penalties for automobile violations have consistently been upheld in Michigan. One of the important cases is *People* v. *Thompson,* 259 Mich. 109 (1932). This case was brought as a challenge to a provision of the Uniform Motor Vehicle Act, requiring a person involved in an injury to stop, identify, and give aid, or be subject to a conviction of a misdemeanor, with a fine of $100 or ten days in jail. The Court upheld the provision, stating at pages 122 and 123:

> "It is settled in this state that the use of automobiles on public highways is subject to regulation under the police power . . . And under the police power, if public welfare or public safety requires regulation of the use of such property, the otherwise private right of unrestricted use must yield to the public exigency. . . . Furthermore, in passing on the validity of the provisions of this uniform motor vehicle act, it must not only be viewed as a police regulation, but also as an enactment under which one is granted the privilege or license of operating a motor vehicle upon the public highways . . .
>
> ". . . In accepting the license from the State, one must also accept all reasonable conditions imposed by the State in granting the license . . .
>
> "And these conditions may be lawfully imposed on the autoist as a licensee regardless of whether he is chargeable with responsibility for the accident in which he is involved. The right to impose the condition is not based upon culpability, but instead it is incident to his status as a licensee. . ."

The reasoning of this case has been followed in subsequent cases challenging the constitutionality of provisions regulating various aspects of automobile use. In each case, criminal penalty sections of valid regulatory acts have been upheld as reasonable and necessary to achieve the beneficial purpose of the act. The Court has held that the validity of criminal penalties provided for by a valid act is to be determined by a broad test of reasonableness.

A leading case is *Surtman* v. *Secretary of State*, 309 Mich. 270 (1944). This case involved a challenge to the provisions of the Financial Responsibility Act requiring a driver to produce "proof of ability to respond in damages for injuries caused" upon demand. Noncompliance was a misdemeanor punishable by jail and/or fine. The Court upheld the act, citing *People* v. *Thompson*, supra, as controlling, and stated at page 278:

> "The test to be applied is one of 'reasonableness.' The restrictions imposed by the Legislature are for the purpose of protecting the life and safety of the traveling public. . ."

As long as the criminal penalties are applied in a non-discriminatory way, and the fines and jail sentences are not excessive, any means of enforcement reasonably designed to insure compliance with the statute are permissible. All of this, of course, is subject to the further condition that the severity of penalties must not exceed the approximate severity of the potential harm caused by noncompliance with the statute.

There is no claim in this case that criminal penalties will be applied discriminatorily. The only question that could be raised here is whether a fine of from $100 to $500, and a maximum of one year imprisonment are excessive.

The validity of a penalty involves consideration of the purpose to be accomplished by the Legislature and the seriousness of the problem with which it undertook to deal. See *People* v. *Wolfe*, 338 Mich. 525 (1953).

This Court cannot say the criminal penalties, plus the revocation of license or registration, are too harsh, in view of the practical necessity of providing penalties to make the Act effective. The criminal penalty is a misdemeanor penalty, and requirement of registration and license revocation is a civil penalty that bears a reasonable relationship to the purpose of the Act.

This Court cannot substitute its judgment as to the reasonableness of penalties for that of the Legislature. It may only interfere when it is clearly shown that they are unreasonable in light of the objects sought to be accomplished by the Statute. Such a conclusion cannot be reached in this case. Therefore, the criminal penalties and revocation provisions of Section 3102(2) of Act 294 are constitutional.

Limitation of Burial Expense, Work Loss Reimbursement and Reimbursement of Household Expenses

Issue No. V relates to the constitutionality of Section 3107 of Act 294.[38]

38. Section 3107 provides as follows:

"Personal protection insurance benefits are payable for the following:

"(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except when the injured person requires special or intensive care, or charges for funeral and burial expenses in excess of $1,000.00.

"(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he had not been injured and expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he had not been injured, an injured person would have performed during the first 3

(Footnote continued on next page.)

No testimony was offered on these issues but stipulations of fact were entered into at the Pre-Trial Conference. It was stipulated that there are times when hospital expenses and funeral and burial expenses will exceed the maximum allowable under the Statute. It was further stipulated that there are times when a person working within the home performs services equal to the services of those working outside the home, and are not compensated to the same extent as those working outside the home. It was further agreed that there are economic and/or pecuniary losses in the death or injury of a person exceeding the amount allowed under the statute for recovery on a no-fault basis. And it was also stipulated that there is at least one person in the State of Michigan who would be unable to get household help to assist that person, without paying daily for such help and who does not have the money to make such daily cash payments.

The first question raised under Issue No. V can be dealt with summarily. It is stated in the Pre-Trial Summary as follows:

> "It is constitutionally permissible for the Act to limit any claim thereunder for funeral and burial expenses to a maximum of one thousand dollars and to limit a claim for property damage thereunder to a maximum of one million dollars, all as more fully described in Sections 3107 and 3121 of the Act?"

(Footnote continued from preceding page.)

years after the date of the accident, not for income but for the benefit of himself or of his dependent. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his claim reasonable proof of a lower value of the income tax advantage in his case, in which case the lower value shall apply. The benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. The maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

The Court deals with the constitutionality of Section 3121 in another section of this opinion, supra. There, the Court found Section 3121 to be unconstitutional for the reasons stated.

With reference to the limitation of $1,000 for no-fault funeral and burial expenses, the Court can see no basis for holding that unconstitutional. This amount is paid upon a no-fault basis, and it is clearly within the legislative discretion to determine the dollar amount to be paid for funeral and burial expenses. The fact that funeral and burial expenses may exceed $1,000.00 on a no-fault basis is irrelevant. The Legislature acted within the range of its power in setting that as the maximum. It should be remembered, of course, that under Section 3135 of the Act, a tort remedy against a negligent tort feasor who causes death remains. There is no question in the Court's mind that the limitation of $1,000.00 for funeral and burial expenses on a no-fault basis is within the Legislature's authority.

Serious constitutional questions arise, however, under Section 3107(b). This Section provides that an injured person may recover work loss consisting of loss of income up to a ceiling of $1,000.00 a month for three years and/or expenses for services "not for income but for the benefit of himself or of his dependent" up to $20.00 a day or approximately $600 per month. A person with both loss of income and expenses for services may recover up to $1,000 per month. Recovery of the expenses for services is subject to a further condition that the expenses must first be "incurred" whereas there is no such requirement regarding lost income. For amounts lost over the $600.00, or the $1,000.00 ceiling, a tort remedy remains under Section 3135 of the Act.

The first challenge is to the differentiation between people who work and receive income and those who work and do not

receive income. The wage earner receives a maximum of $1,000.00 on a no-fault basis for wage loss,[39] and the person who does not work for income receives expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those which the injured person would have performed himself.

Plaintiffs claim that the statute, in setting what is in effect a $600.00 monthly maximum on replacement services and a thousand dollar monthly ceiling on replacement of wage losses on a no-fault basis, invidiously discriminates against those who perform work not for pay. They further claim that the obvious effect is to treat women working in the household differently from those earning a living outside the home.

The basic question is whether there is an invidious discrimination against those who do not work for pay, and against women.

It should first be noted that the replacement services provide a long-overdue benefit that will benefit more women than men. For example, the working widow, who is supporting her family and receives benefits under workmen's compensation, receives no added benefit to take care of the cost of replacement services for caring for her children while she is incapacitated. P.A. 294 does provide these added benefits for such a woman if she is hurt in an automobile accident.

The fact that the statute sets a lower maximum figure for those who do not work for pay does not in and of itself make this section of the statute invalid. To the contrary, the Legislature has recognized that those who perform services in the home should receive compensation as an economic loss, even though their services originally had not been paid for in money.

Fronterio v. *Richardson*, 411 U. S. 677, 36 L Ed 2d 583 (1973) does not require the striking down of this section of the

39. This is subject to a deduction of 15% because benefits received from personal protection insurance are not taxable income.

statute. There the statute provided, solely for administrative convenience, the spouses of male members of the uniformed armed services were dependents for purposes of obtaining increased quarters allowances and medical and dental benefits. But spouses of female members were not dependents unless they were in fact dependent for one-half of their support.

The Supreme Court struck down the statute holding that it violated the Due Process Clause of the Fifth Amendment insofar as it required a female member to prove the dependency of her husband. It found classifications based on race, sex or national origin are inherently suspect.

It cannot be said in this case that the classification here is based upon race, sex or national origin. The classification is a classification between those who work for pay and those who work in the household, but not for pay.

The standard we must apply is that of *Gauthier* v. *Campbell, Wyant & Canon Foundry Company*, 360 Mich. 510 (1960). It is the standard of reasonableness, and the case holds that the equal protection clause allows a wide scope of discretion and classification, and a statute may not be struck down unless the classification is without any reasonable basis and is purely arbitrary.

The Court said on page 52:

> "When called upon to interpret social legislation, this Court has sought construction which accorded both with the legislative intent and the stated remedial purposes of the Act in question . . . The changes sought in this appeal would require obvious violation of legislative intent and substitution of judicial judgment for the expressed judgment of the Legislature."

This Court is being asked to do what the Supreme Court refused to do in *Gauthier*. The Court cannot find that the classification made here between those who work for compensation and those who do not work for compensation inside the house is so invidious as to strike it down under the Equal Protection

Clause. To do so would be to substitute this Court's judgment for the Legislature. This the Court may not do.

Next, the Court must consider that portion of Section 3107(b) which requires payment for replacement services before reimbursement can be claimed. It is claimed that this requirement discriminates against those who are too poor to incur replacement services.

It has been stipulated that there is at least one person in Michigan that would be unable to obtain such services on credit and who does not have the cash to pay for them. This person, and the Court is sure there are thousands more in this class, would be unable to take advantage of the provisions of the Act because he or she could never pay for the replacement services. Therefore, this person would not be able to seek reimbursement.

It appears to the Court that this provision invidiously and arbitrarily discriminates against the poor, has no relationship to the purposes of the Act, and sets up a classification that is constitutionally infirm under equal protection standards.[40]

Both those who work outside the house, and those who work in the house and do not receive compensation for it, suffer losses that are economically measurable. The quality of life and the injury to the public health, welfare and morals are equally diminished by loss of services as by loss of income, and there is an equal need to replace both. Furthermore, the value of services, especially those of housewives, have been traditionally undervalued, making recovery for lost services potentially even more expensive and risky than recovery of income. The danger of long delays in replacement services is more dangerous than delays in replacement income. Invalids and small children cannot be left unprovided for long. For these reasons, in addition to the other already stated, the requirement of Section 3107(b) that service costs be incurred has an effect contrary to the public health and safety.

40. *Reed* v. *Reed*, 404 U. S. 71 (1971); *Naudzius* v. *Lahr*, 253 Mich. 216 (1931).

This requirement simply means that those with low incomes and those otherwise unable to obtain credit will not be able to receive reimbursement since they will not be able to obtain services on a pay-as-you-go basis. They will be forced to forego necessary services which the underlying purposes of the Act suggest should be recoverable.

It is claimed that the requirement that replacement services be on a reimbursement basis only is reasonable to avoid fraud or the misuse of funds. This claim, however, does not withstand an equal protection challenge. The market value of services is readily determinable, and fraud and misuse can be avoided in the suspicious case by a showing that the funds allocated were in fact not used for replacement services. Minor administrative problems may not be used as a reason for denying equal protection.

The Court is well aware of the presumption of constitutionality, but there is a less of a presumption where a statute imposes burdens, instead of granting privileges. The presumption is also less strong where the burdens apply to a suspect class. The purpose of this portion of the statute may not be to burden a suspect class, but its practical effect falls in large part upon the poor who do not have credit to obtain replacement services and do not have the cash to advance for such services. Sound public policy makes it unreasonable to unduly burden this group.

For the reasons given, that portion of Section 3107(b) requiring that the cost of replacement services must be incurred and subsequently be reimbursed is unconstitutional as violative of the Equal Protection Clauses of both the 14th Amendment and the Michigan Constitution.

Subtraction of Benefits Provided Under State and Federal Laws from Personal Protection Insurance

Issue No VI, as set forth in the Pre-Trial Statement, concerns the constitutionality of Section 3109(1) of Act 294, which reads as follows:

> "Section 3109(1): Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

At the Pre-Trial Conference, the Court took judicial notice of the fact that there are people within the State of Michigan who received benefits required to be provided under the laws of Michigan and the federal government. It was stipulated then that there were people who, under volunteer programs, were entitled to be compensated for medical expenses and wage losses, and who would not be required under the Act to subtract such compensation from the personal protection insurance benefits provided by the Act. It was further agreed that employer-owners of motor vehicles, required to provide workmen's compensation insurance under the state law, are charged lower rates for personal protection insurance benefits because of this fact.

Two specific issues were formulated at the Pre-Trial Conference. The second one will be dealt with first. It is as follows:

> "Is it constitutionally permissible to provide in the act that workmen's compensation benefits are to be subtracted from personal protection insurance benefits otherwise payable for an injury, thereby permitting a lower rate to be charged to employer-owners of motor vehicles for insurance required by the act because such owners are required to provide workmen's compensation insurance under the state law"?

Subsequently the Court will deal with the basic equal protection question contained in Section 3109(1). It feels, however, that it must deal first with the second question. This issue addresses itself to the constitutionality of allowing employer-owners to receive lower insurance rates because they are required to provide workmen's compensation insurance under the law.

It appears that there is no constitutional question involved here. The lower rate flows from the provisions of the statute and the mere granting of the lower rate itself does not raise a constitutional question. The gravamen of the issue is whether there can be a deduction from personal protection for benefits required to be provided under the laws of the state or federal government, while at the same time not requiring subtraction for benefits provided for under voluntary plans.

The basic issue here is the first question of Issue No. VI of the Pre-Trial Statement. It is as follows:

> "Is it constitutionally permissible to require under the act subtraction from personal protection insurance benefits, otherwise payable for an injury, benefits provided or required to be provided under the laws of any state or the federal government, including workmen's compensation benefits, while at the same time not requiring under the act subtraction of benefits provided from voluntary sources?"

Section 3109(1) establishes a differentiation between two classes of persons claiming under Act 294. One consists of those covered under no-fault and also under voluntary private insurance plans. This group is allowed to retain any duplication of personal protection benefits. The second class consists of those eligible for benefits under no-fault, but who also receive some benefits from either a federal or state program, such as workmen's compensation. These people may not retain any resulting duplication, as all collateral source benefits they receive must be subtracted from the no-fault benefits. Plaintiffs claim that this discrimination in classification is invalid under the Equal Protection Clause of the 14th Amendment, and the Michigan Constitution.

The Court will not analyze in detail the basic standards of equal protection. This has been done elsewhere in this opinion.

The most recent Michigan Supreme Court pronouncement upon the subject is *Fox* v. *Employment Security Commission*, 379 Mich. 579 (1967). In that case, weekly unemployment benefits were denied by statute to those receiving total permanent, partial permanent, or temporary disability workmen's compensation payments, as well as to those receiving weekly compensation benefits. However, the statute permitted the recipients of death workmen's compensation benefits, "specific loss" benefits, and those who had elected to accept their workmen's compensation award as a "lump sum" to receive unemployment compensation. The Court noted that the object of the statute was to preclude the possibility of the duplication of benefits, but held the distinction to be arbitrary, since some people were able, because of the statutory scheme, to obtain unemployment benefits, and others similarly situated were not.

The Court recognized that legislative classification must be upheld wherever possible, and that the Legislature has broad discretion to classify, so long as the classification was not arbitrary or invidiously discriminatory. Citing *People* v. *Chapman*, 301 Mich. 584, which quoted from *Haynes* v. *Lapeer Circuit Judge*, 201 Mich. 138, the Court said on page 589:

> " 'Legislation which, in carrying out a public purpose for the common good, is limited by reasonable and justifiable differentiation to a distinct type of class of persons is not for that reason unconstitutional, because class legislation, if germane to the object of the enactment and made uniform in its operation upon all persons of the class to which it naturally applies; but if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary subclassification, it comes within the constitutional prohibition against class legislation.' "

The Court held that classification was invalid in denying plaintiff and others like him equal protection.[41]

41. See also *Gallegos* v. *Glaser Crandell Company*, 388 Mich. 654 (1972), holding a section of the Workmen's Compensation Act

(Footnote continued on next page.)

In *Bowser* v. *Jacobs*, 36 Mich. App. 320 (1971), the Court was concerned with the constitutionality of a section of the Motor Vehicle Accident Claims Act which prevented those covered by workmen's compensation from applying under the Act for payment. In that case plaintiffs were taxicab operators, who, while in the course of their employment, were injured in automobile accidents allegedly caused by uninsured motorists. They received workmen's compensation and sought to bring an action against the uninsured motorists and the Secretary of State in his representative capacity as administrator of the fund. In each case, the Secretary of State relying upon Section 29 of the Act, which barred recovery by an injured person from the fund if the claimant was covered by workmen's compensation, sought dismissal of the cases. Those who had private insurance were not barred from recovery from the fund, whereas those who received payments for workmen's compensation were barred.

The Court struck down the classification, saying on page 328:

> "The legislative aim of this social legislation . . . is to compensate those injured by uninsured tort feasors who would otherwise have had no source of recovery. But, as we have seen, some persons who have available avenues of recovery are permitted to reach the Fund but injured employees are not. We are constrained to agree that the legislature has arbitrarily carved out this class from those who have recourse to the Fund. This classification is one made without the force of compelling logic; we find it unconstitutionally discriminatory."

It is claimed that the classification in Section 3109 is reasonable because the basic purpose of Act 294 is to provide personal protection coverage for all those injured, and the plaintiff, who has workmen's compensation coverage, will receive the same benefits as a person with private insurance, because the deduc-

(Footnote continued from preceding page.)

excluding agricultural workmen paid on a piecework basis and those who work less than 35 hours per week and/or 13 consecutive weeks for the same employer from benefits, unconstitutional under the Equal Protection Clause.

tion from personal protection benefits are made only to the extent that workmen's compensation is paid.

The Court does not agree. Workmen's compensation and social security benefits are received by employees as a matter of right. Personal protection insurance must be purchased if a person is to drive an automobile. The basic purpose of Act 294 is to guarantee persons injured in automobile accidents full medical and rehabilitation expenses and wage losses.

The classification of Section 3109, which allows full personal protection benefits, plus private insurance benefits to one group, and yet deducts from personal protection benefits anything received under a governmental system is arbitrary and unreasonable. Upon the authority of *Fox* and *Bowser*, there is no legitimate legislative purpose for establishing such a distinction, and it arbitrarily discriminates against those who receive certain federal and state benefits as a matter of right.

The only conceivable purpose for such legislation is one of reducing overall cost by preventing duplicate pay-offs. However, it is arbitrary to prevent duplication for some of the classes of recipients and not for others, absent some reasonable legislative purpose. There is no evidence in this case of such purpose. Additionally, the overall cost of the program may not be reduced by arbitrarily depriving some members of the class of benefits for which they have paid premiums.

In reaching this conclusion, the Court is aware of *Tilmon* v. *Kaye*, 46 Mich. App. 63 (1973). There, the Court approved a Michigan statute, which required a reduction of the amount paid out of the Motor Vehicle Accident Claims Fund of amounts paid by an insurer, where a plaintiff received workmen's compensation benefits pursuant to his employment as a cab driver. It held that the fund was entitled to reduction of judgment against it, equal to the amount of the workmen's compensation benefits.

In deciding *Tilmon*, the Court recognized the existence of *Bowser*, and sought to distinguish it. In its analysis, the Court

ignored *Fox*. To the extent *Tilmon* disagrees with *Fox*, the conclusion of *Tilmon* cannot be sustained. This Court must follow the Supreme Court, and *Tilmon* cannot be considered as authority for a holding by this Court contrary to the one made herein.[42]

Section 3109(1), insofar as it creates two different classes based solely upon the source from which the extra compensation is paid, is arbitrary and discriminatory. Those provisions providing for the deduction from personal protection insurance, of benefits provided or required to be provided under the laws of any state or the federal government, are unconstitutional as a denial of equal protection.

Constitutionality of Deductibles Provided Under Section 3109(3) and Section 3109(a)

Issue No VII is as follows:

> "Is the authority granted the Insurance Commissioner under the Act to approve deductibles as provided in Section 3109(3) constitutionally defective"?

It was agreed at the Pre-Trial Conference that there was no factual issue to be determined here. The issue is purely a legal one.

Section 3109(3) (MCLA 500.3109(3); MSA 24.13109) provides as follows:

> "An insurer providing personal protection insurance benefits may offer, at appropriately reduced premium rates, a deductible of a specified dollar amount which does not exceed $300 per accident. This deductible may be applicable to all or any specified types of personal protection in-

42. The Court is also aware of *Lofty* v. *Richardson* (CA 6) 440 F 2d 1144 (1971). This case would appear on the surface to be contra to *Fox* and *Bowser*, although it might be distinguished on the basis that it involved benefits under two social welfare programs. To the extent that it is inconsistent with *Fox*, this Court must follow *Fox*, which is the controlling law in Michigan, and not the decision of the United States Court of Appeals.

surance benefits but shall apply only to benefits payable to the person named in the policy, his spouse, and any relative of either domiciled in the same household."

In considering whether there is unconstitutional delegation of authority of the Legislature to the Insurance Commissioner the Court must interpret the statute in the way most likely to uphold its constitutionality. It is clear that such interpretation must hold that the final sentence of paragraph 3 applies only to personal protection insurance deductibles regarding persons not in the specifically mentioned categories of paragraph 3. In addition, the Section will be construed not to authorize deductibles in residual liability and property protection insurance.

Thus we are concerned only with deductibles in personal protection insurance benefits for those other than the person named in the policy, his spouse, and any relative of either domiciled in the same household.

Legislative powers may not be delegated to administrative agencies. The rule is stated clearly in *Callaghan's Pleading & Practice,* Administrative Authority, page 94, as follows:

> ". . . and under the doctrine that the vesting of legislative power in the Legislature prohibits its transfer to, or exercise by, any other body or person, purely legislative power . . . cannot be delegated by the Legislature . . . and a statute is unconstitutional so far as it attempts to do so or where it would have that effect."

And the Michigan Constitution of 1963, in Article III, Section 2, provides: "No person exercising powers of one branch shall exercise powers properly belonging to another branch, except as expressly provided in this Constitution."

In addition to the Constitutional concern for maintaining separation of powers, there is the more basic aim of providing protection against arbitrary or discriminatory exercise of broad discretionary power by administrative agencies. To avoid abuse of discretion by administrative agencies, any statutory delegation of power must provide standards and policies sufficient to pro-

vide a basic and meaningful judicial review as a necessary safeguard. This is even true in the case of the judiciary, as pointed out in *People* v. *Fields,* 388 Mich. 66 (1972), dealing with the power of the Probate Court, Juvenile Division, to waive juveniles to Circuit Court for trial. The Court pointed out, in holding the statute allowing waiver to adult court unconstitutional because it lacked standards, the following on pages 75 and 76:

> ". . . Absent carefully defined standards in the statute itself, which would justify such disparity of treatment, there is no way by which it can be determined what standard a Probate Judge should apply in a waiver proceeding. He might use the standard used by Judge O'Brien. He might use the standard contended for the prosecutor—'the child's welfare and the best interests of the state.' This standard is so vague and subject to so many possible interpretations as to be no standard at all. He might formulate his own standard for review by the Appellate Courts of this state on a case-by-case basis. He might apply the standard set forth in JCR 1969, 11. . . .
>
> "If the legislature is to treat some persons under the age of 17 differently from the entire class of such persons, excluding them from the beneficient processes and purposes of our Juvenile Courts, the Legislature must establish suitable and ascertainable standards whereby such persons are to be deemed adults and treated as such subject to the processes and penalties of our criminal law. . . ."

On re-hearing with five justices of the Supreme Court sitting, the Court, on March 19, 1974, reaffirmed its earlier opinion, 391 Mich. 206 (1974).[43]

Michigan case law generally requires express statutory standards for delegations of authority. A leading case is *Osius* v.

43. Justice Levin, dissenting, carefully analyzed the problem of setting standards for delegation and found (p. 234 of 391 Mich.):

> ". . . Courts ultimately make a pragmatic analysis of whether the consequences of the delegation are so undesirable as to require a judicial intervention, and . . . it is not possible to articulate or enumerate all the factors that appear to motivate decision . . ."

St. Clair Shores, 344 Mich. 693 (1956), where a Zoning Board of Appeals had been given power "to hear and decide" all cases properly before it, with no standard for decision expressed. The Court found this to be an unconstitutional delegation of Legislative authority. The Court pointed out on pages 699 and 700:

> "Upon the facts presented, we are not concerned with the problems of variations in permissible standards between morally good and bad business, nor need we weigh the various factors that have influenced decisions in the past upon the adequacy of the standard employed. For in the case before us, there is no reasonable standard whatever. The presumption of constitutionality of zoning regulations . . . cannot prevail against unconstitutionality patent on the face of the ordinance itself, nor can the ordinance be saved by its broad statements as to the public health, safety, and general welfare, since such statements afford no sufficient guide for the Board in the exercise of its discretion . . .
>
> "Without definite standards an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition to the granting of authority to one and the withholding from another . . . The ordinance . . . is unconstitutional and void . . . since it fixes no standard for the granting (or refusal) of the certificate prayed. . . ."[44]

The rule outlined above is modified where a statute with no express standards imposes an exact policy, so that any administrative abuse of discretion can be reliably determined judicially. It particularly applies to a statute with no express standards which incorporates by reference a second statute with sufficiently definite standards. *City of Pleasant Ridge* v. *Gov-*

44. See also *Devereaux* v. *Township Board of Genesee Township,* 211 Mich. 38 (1920); *Hoyt Brothers, Inc.* v. *City of Grand Rapids,* 260 Mich. 447 (1932).

It pointed out in *Argo Oil Company* v. *Atwood,* 274 Mich. 47 (1935), that the personal judgment of an agency is not a standard sufficient to uphold the constitutionality of a statute if the statute expressly confers policy making power upon an administrative agency.

ernor, 382 Mich. 325 (1969). There is also some authority that express standards need not be set forth if it is impracticable for the Legislature to do so, and if the legislative policy is clearly expressed in the Act.[45]

In *Redmond & Co.* v. *Michigan Security Commission,* 222 Mich. 1 (1923), an act allowed the Commission to revoke a license 'for good cause.' The court held (page 5) that the exercise of the power "must, if delegated to a commission or administrative board, define its purpose and the means of attainment thereof, and do this in language leaving no wide administrative discretion and no discretion at all of a legislative nature. The power . . . may be delegated . . . so long as the exact policy is clearly made apparent . . ." See also *People* v. *Babcock,* 341 Mich. 671 (1955).

In analyzing Section 3109(3), it should first be noted that the Section does not refer to any express standards in the insurance code, as there are none. Therefore the exception allowing a broad delegation without standards, where incorporated by reference to a second statute with definite standards, is not applicable in the instant case.

Section 3109(3) has no standards whatever for the deductible provisions requiring the prior approval of the Commissioner, and in no place does it refer to legislative standards set forth elsewhere. Nor is the policy to be followed in allowing these deductibles at all clear or obvious. It does not seem appropriate to assume by total legislative silence that the traditional rules of the Insurance Commissioner under a voluntary, negligence-oriented society should be applied to compulsory no-fault. Nor does the language of 3109 in its entirety provide an adequate

45. See 1 Am Jur 2, paragraph 116, Administrative Law, pages 919 and 920, where it is said:

> "The standard which is to guide the discretion of administrative agencies, need not in all instances be expressly stated in the statute or ordinance. It is not always necessary to prescribe a specified rule of action to govern the exercise of power conferred, particularly where a standard is implied in the statute or ordinance conferring the power."

basis for any judicial review of the Commissioner in approving deductibles.

It is obvious that it would not have been impracticable for the Legislature to have set forth some general standards or legislative policy regarding these deductibles.

It therefore appears that the provisions of 3109(3) providing that any other deductible provisions require the prior approval of the Commissioner is unconstitutional in that it unconstitutionally delegates this authority to the Insurance Commissioner without any standards whatever.

Since the completion of this trial, the Legislature has added to Act 294 a new section—3109(a), which becomes effective on June 4, 1974, and provides as follows:

> "An insurer providing personal protection insurance benefits shall offer, at appropriately reduced rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the Commissioner and shall apply only to benefits payable to the person named in his policy, the spouse of the insured, and any relative of either domiciled in the household."

It is argued that this section is unconstitutional because it fails to specify any standards by which the Commissioner power of approval is exercised. It is claimed it leaves legislation discretion in the Commissioner, and that the Legislature could have made a more definite expression which would more clearly delimit the Commissioner's power.

It is true that more definite standards could have been established, but that is not the test. The test is whether the delegation is so lacking in standards as to offend the Constitution.

The Court holds that Section 3109(a) is constitutional. Both the standard for approval and the policy for claiming the deductibles and exclusions are sufficiently clear to allow judicial review and to provide meaningful guidelines for the Commissioner

and for the people seeking to buy the insurance. The insurer is required to offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage of the insurance. By reference to these coverages the Commissioner approves and disapproves the deductibles. A Court on judicial review can adequately determine from a reference to these policies whether there has been proper action on the part of the Commissioner. Therefore this new section is not constitutionally defective for lack of standards.

Provisions Relating to Nonresident Motorists

Issues III and VIII of the Pre-Trial Conference relate to the constitutionality of the requirements relating to out-of-state motorists in Michigan.

Section 3102(1) outlaws for more than thirty days in any calendar year the operation in Michigan of motor vehicles, not registered in this state, unless their nonresident owners or registrants maintain the required insurance coverage under Act 294. Section 3113(c) provides that a person is not to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident he was not a resident of the State, was an occupant of a vehicle not registered in the State and was not insured by an insurer who had filed a certificate in compliance with Section 3163.

The Court will consider first the constitutionality of Section 3113(c). The net effect of this section is to deny the transient nonresident passing through Michigan, or traveling within the State for less than an aggregate of thirty days in any calendar year, PIP benefits. It also denys him any tort rights against negligent insured Michigan motorists unless his injuries exceed the threshold amount set forth in Section 3135(1). In addition, the nonresident transient is not required to maintain security, and remains subject to common law tort liability. It is also important to note that a resident passenger of an uninsured motor

vehicle, unlike his nonresident counterpart, is not barred from recovery of no fault PIP benefits.

Such disparate treatment of resident and nonresident motorists, and their passengers, violates the due process and equal protection standards discussed earlier in this opinion. There was no evidence offered that such disparate treatment was reasonably related to any proper legislative purpose, nor was any evidence offered to justify the classification. It should also be pointed out that State Farm's proposed interpretation of 3135(2) cannot save this section of the statute, for the Court has already rejected such interpretation.

For these reasons, the provisions of Section 3113(c) denying a nonresident transient recovery of personal protection insurance, and also depriving such transient of tort recovery below the threshold, is invalid.

The other section of the Act with which the Court must deal is Section 3102(1). It requires a nonresident owner or registrant of a motor vehicle not registered in the State to maintain PIP benefits if he operates the vehicle in the State for an aggregate of more than thirty days in any calendar year.

This section has been attacked as violating the due process rights of nonresident motorists, as denying nonresidents equal protection of the laws, and as being an undue burden upon interstate commerce.

The Court finds Section 3102(1) not violative of either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, or those of the Michigan Constitution. The difference in the treatment of out-of-state motorists in Michigan an aggregate of thirty days in any one year is reasonably related to the essential purposes of the Act and is not arbitrary and discriminatory. No invidiously discriminatory classification is established.

It is undisputed that the Legislature has the power to regulate by statute the operation and use of motor vehicles and

motor vehicle insurance in Michigan.[46] As has been pointed out previously, this exercise of the police power is subject to constitutional limitations, and the legislation must bear a substantial relationship to the public health, safety, morals and general welfare. Furthermore, the scheme must not arbitrarily create an invidious discrimination against any class of persons.

This opinion has spoken at length about the basic purpose of the Act, and the requirements of compliance with the Act on the par [sic] of nonresident motorists who are in the State more than thirty days in any one year seem to be embraced within these fundamental purposes.

There is no question but that a state can legitimately apply the structures of its regulatory scheme to nonresidents motoring within its boundaries. In *Hess* v. *Pawloski*, 274 U. S. 352, 71 L Ed 1091 (1927), the Court endorsed such an exercise of the inherent police power of the state. It said on page 356:

> "The State's power to regulate the use of its highways extends to their use by nonresidents as well as by residents."

Furthermore, the testimony showed that 99% of the Nation's automobile insurance companies have consented to automatically extend to those of their insured who drive in Michigan, the coverage mandated by Act 294.[47] So, as a practical matter, the requirements of this section cannot be said to have an unreasonable or arbitrary effect upon nonresident motorists driving in Michigan because the overwhelming majority of them, who are insured, automatically receive, upon entering the State, the benefits of Michigan first-party coverage and tort immunity.

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46. *Hawkins* v. *Ermatinger*, 211 Mich. 578 (1920); *McGannon* v. *Michigan Millers and Mutual Company*, 127 Mich. 636 (1901); *American Motorcycle Association* v. *Department of State Police*, 11 Mich. App. 351 (1968).

47. See the testimony of Mr. Rowe on March 4, 1974.

It is argued that the thirty day requirement is arbitrary and discriminates against migrant workers, students and tourists. Although it could be argued that a greater number of days should have been chosen, it is within the discretion of the Legislature to determine when a driver privileged to use Michigan highways becomes enough of a threat and expense to Michigan motorists to bring him within the no-fault system. The thirty day limit is not clearly unreasonable, and therefore this Court cannot substitute its judgment for that of the Legislature.

Nor can it be seriously contended that this section is an undue burden upon interstate commerce. It is true that the exercise of the state's police power in the area of motor vehicle operation is subject to limitations imposed by the Interstate Commerce Clause. In *Hendrick* v. *Maryland*, 235 U. S. 610, 59 L Ed 385 (1914), the Supreme Court of the United States, in sustaining the vehicle registration statute of Maryland, referred to the applicable test. On page 622, it said:

> "This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens, and it does not constitute a direct and material burden on interstate commerce."

The Court further stated on page 624:

> "There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the state, and is consequently bad according to the doctrine announced in *Crandall* v. *Nevada*, 6 Wall 35. In that case a direct tax was laid upon the passenger for the privilege of leaving the State; while here the statute at most attempts to regulate the operation of dangerous machines on the highways and to charge for the use of valuable facilities."

A statute that would interfere with the right of people to pass through Michigan would run afoul of *Crandall*, but this

section does not do that, because it excludes from the mandatory insurance requirement those nonresident motorists who operate their motor vehicles in Michigan for less than thirty days in one year.

It appears that the burden on interstate commerce in Section 3102(1) is a permissible one. It is slight and one which is necessary to accomplish a valid legislative goal.

For the reasons given, Section 3102(1) is constitution. [sic]

Interpretation of Section 3116

Issue Number X relates to the proper interpretation of Section 3116. This section provides for reimbursement of benefits received from the insurance company upon actual recovery in tort. The statute provides, in pertinent part:

> ". . . after recovery is realized upon a tort claim, a subtraction shall be made to the extent of the recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If personal protection insurance benefits have already been received, the claimant shall repay to the insurer out of the recovery a sum equal to the benefits received . . ."

The purpose of this section is to prevent double recove [sic] of economic losses by those who retain their tort right to sue for economic losses either because they were injured by an uninsured driver or were injured in another state where the right to sue in tort for an automobile accident is preserved. This appears to be the clear meaning of the section.

The Court construes this section of the statute to mean that like benefits must be reimbursed when like benefits have been recovered previously. Thus where the insured recovers through judgment actual economic losses, which have been paid previously under personal protection insurance to the injured, those amounts must be used to reimburse the insurance company. This will prevent the person who is involved in an accident with an

uninsured motorist in Michigan, against whom he has a right to bring suit, or who is involved in a motor vehicle accident in another state where the right to sue in tort for vehicle accidents still exists, from recovering compensation for the same economic loss twice, once from his insurance company and once from the defendant.

The Court places this limitating construction on this section to avoid reaching the constitutional issue raised by plaintiffs' reading of the language of the section. A court should always refrain from reaching constitutional questions if possible, especially where a fair construction of the statutory language will avoid a constitutional problem. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 91 L Ed 1666 (1947).

Justice Brandeis pointed out in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L Ed 396 (1936), in his concurring opinion, at page 348:

> "When the validity of an Act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Thus, the Court holds that under this section like benefits must be reimbursed, when like benefits have been previously allowed. This ruling affects all people equally, and no equal protection problem is presented.

Constitutionality of Requirement That the Operator of a Vehicle in the Business of Transporting Passengers Provide Personal Protection Benefits for His Passengers

Issue Number IX of the Pre-Trial Statement raises the question of whether Section 3114 is constitutional in requiring that personal protection benefits be recovered from the operator of a motor vehicle operated in the business of transporting passengers for hire. Plaintiffs stated in the Pre-Trial Statement that they would produce an actuary who would testify as to differences in rates charged to transportation companies because of this provision. No such testimony was offered, and the Court finds that there has been no showing of the unconstitutionality of this section.

Severability

The final determination to be made by the Court is whether those sections of Act 294 the Court has found unconstitutional are severable so that the balance of the statute may stand. It was determined at the Pre-Trial Conference, either by the finding of the Court or by stipulation, that certain sections of the Statute were severable. There was a dispute as to the severability of other sections.

The Court has determined that the distinction in Section 3101(2) between two-wheeled motor vehicles and other motor vehicles is constitutionally infirm. At the Pre-Trial Conference, over the objection of counsel for the plaintiffs and after full argument, the Court determined that the section is severable. The Court has received nothing since then to change its opinion. The Section is severable, and two-wheeled motor vehicles must comply with the provisions of Act 294.

The Court has determined that it is constitutionally infirm to provide that Workmen's Compensation benefits and other benefits received from governmental sources be subtracted from personal protection insurance benefits, while benefits provided from voluntary sources are not subtracted. It was stipulated in the Pre-Trial Statement that this section is severable. No further consideration of the severability of this section is therefore necessary. Workmen's Compensation benefits, and other benefits received from governmental sources, may not be subtracted from personal protection benefits.

The Court has determined that the authority granted the Insurance Commissioner to approve deductibles under Section 3109(3) is constitutionally defective. It was agreed by all parties at the Pre-Trial Conference that this section is severable. Therefore, the Court holds it is severable.

In addition, the Court has determined that the provision of Section 3107 requiring costs to be incurred before the twenty-dollar daily payment is made is unconstitutional; that Section 3113 (c) relating to the out-of-state driver who is not in the state an aggregate of thirty days in any year is unconstitutional; and that Sections 3121, 3125 and 3127 are unconstitutional.

It is the the opinion of the Court that all of these sections are severable for the reasons set forth below.

It is generally held that if unconstitutional portions of a statute are severable from the remainder of the Act, the valid parts of the Act remains in effect, but if the invalid portions are not severable from the remainder, then the whole Act must fall.

In Michigan, specific severability sections are seldom written into statutes, as all statutes are subject to MCLA 8.5 (MSA 2.216). This Act states:

> "In the construction of the statutes of this State the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> > "If any portion of an Act or the application thereof to any person or circumstance shall be found to be invalid by a Court, such invalidity shall not affect remaining portions or applications of the Act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the Court to be inoperable, and to this end, Acts are declared to be severable."

There is a clear and strong presumption in favor of severability. MCLA 8.5 has been used as authority in many cases for upholding valid remainders of statutes.[48]

People v. *McMurchy*, 249 Mich. 147 (1930) sets forth a good overview of the various factors to be considered. This case involved a statute defining the crime of negligent homicide and divesting the trial judge of the right to grant a directed verdict when no fact dispute was involved. The latter section was held unconstitutional and the question of severability was considered by the Court.

In discussing the continuing validity of the remainder, the Court said on page 157, quoting "Cooley on Constitutional Limitations":

> "It will sometimes be found that an act of the Legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable . . . Whether the other parts of the statute must also be adjudged void because of the association must depend upon consideration of the object of the law, and in what matter and to what extent the unconstitutional portion affects the remainder . . . It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same Act, but not connected with or dependent on others which are unconstitutional . . . (The unconstitutionality of one part) does not authorize the courts to declare the remainder void also, unless all provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the Legislature would have passed the one without the other . . . *If . . . that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained . . .*" (Emphasis added.)

48. *Rohan* v. *Detroit Racing Association*, 314 Mich. 326 (1946); *People* v. *Desilva*, 32 Mich. App. 707 (1971); *People* v. *Giacalone*, 17 Mich. App. 508 (1969); *Maki* v. *City of East Tawas*, 385 Mich. 151 (1971).

The determination of severability must be made on a portion by portion basis. The basic test is whether or not upholding the balance of the Act is consonant with the original legislative intent.

The rule was clearly stated in *Mathias* v. *Kramer*, 73 Mich. 5 (1888), where the Court said, on pages 8 and 9:

> "An unconstitutional provision or section in a statute will not affect the other provisions of the law unless they are essentially and inseparably connected in substance."

The rule was also well stated in "The Legislative Status of an Unconstitutional Statute," 49 Mich. Law Review, 645 (1951), where the writer says on page 656:

> "So long as there is 'something of form and substance' left which is constitutional, amendment is not only permissible but possible, and reenactment of the old Act with the amendatory provisions incorporated therein is not required."

Intactness of purpose or meaning is one index of legislative intent. A second index is completeness and effectiveness, and a corollary of completeness and effectiveness is the question of whether or not the remainder of the statute can be given legal effect.

Considering the basic test, namely, whether the upholding of the balance of the Act is consonant with the original legislative intent, it appears that all of the sections that have been declared unconstitutional are severable.

The provisions requiring expenditure before reimbursement for replacement services can be removed from Act 294 without affecting the basic legislative intent. All the severability of this section means is that PIP benefits must be paid up to $20.00 for replacement services without the necessity of first incurring them.

The provisions denying the transitory out-of-state or out-of-country driver the right to recover personal protection insurance

benefits, if he is not insured by an insurer who filed a Certificate in compliance with Section 3163, is readily and easily severable. This person retains his right to recover in tort if he is not insured by an insurer who has filed a Certificate.

Sections 3121, 3123, 3125 and 3127 are equally severable. With their severance, personal protection insurance benefits remain for all drivers, but property losses may be pursued under the traditional tort law. This was the approach that was taken in Florida in two separate cases (supra).

Conclusion

Therefore, for the reasons given, Act 294 is constitutional with the exception of those sections declared to be unconstitutional.

These sections, all of which are severable, are the following:

(1) Section 3101(2) insofar as it excludes two-wheeled motor vehicles. Two-wheeled motor vehicles must comply with the mandatory provisions of Act 294.

(2) Those provisions of Section 3107 providing for payment for loss of services only on an incurred cost basis. Henceforth, the replacement services must be paid as other PIP benefits are paid.

(3) The provisions of Section 3109(3) relating to deductibles beyond the specified $300.00 limit. The Insurance Commissioner has no power under this section to approve these deductibles until adequate legislative guidance is given.

(4) The provisions of Section 3109 providing subtraction from personal protection benefits of benefits paid under the laws of any state or the Federal Government. Hereafter, there shall be no deduction for such payments.

(5) Section 3113(c) in that it denies personal protection insurance benefits and tort recovery for those out-of-state drivers who are in the state for less than thirty days who are not in-

sured by an insurer who filed a Certificate in compliance with Section 3163. Those drivers retain their usual tort rights.

(6) The property protection insurance provisions of 3121, 3123, 3125 and 3127. The Act no longer will cover property damage and until further legislative action, the usual tort remedies remain for property damage.

The findings in this Opinion shall constitute the findings of fact and conclusions of law upon the issues framed pursuant to the provisions of GCR (1963) 517.1.

Finally, the Court commends all counsel for the excellent manner in which this case was tried, argued and briefed. All counsel have adequately, thoroughly and completely represented their clients.

A Judgment embodying the holdings of this Opinion may be presented. No costs will be awarded, public questions being involved.

A stay of 20 days from the entry of Judgment will be allowed.

HORACE W. GILMORE
CIRCUIT JUDGE

Detroit, Michigan
May 20, 1974

ADDENDUM

On May 13, 1974, the Court was furnished by counsel for State Farm with a copy of *Manzanares, et al* v. *Bell, et al,* in which the Supreme Court of Kansas on May 7, 1974, upheld the Kansas No-Fault Automobile Insurance Act. Subsequently, letters commenting on the Opinion were received from other counsel.

The Court has considered that Opinion and the letters received. There is nothing in the Opinion which would require or move this Court to change any of its holdings heretofore set forth.

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APPENDIX G.

STATE OF MICHIGAN
In the Circuit Court for the County of Wayne

CATHERINE SHAVERS, et al.,
Plaintiffs, Appellants, Appellees and Cross-Appellees,

v.

FRANK J. KELLEY, Attorney General of the State of Michigan; RICHARD H. AUSTIN, Secretary of State of Michigan; DANIEL J. DEMLOW, Commissioner of Insurance of the State of Michigan; AETNA CASUALTY & SURETY COMPANY; THE TRAVELERS INDEMNITY COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; CONTINENTAL CASUALTY COMPANY; THE HOME INDEMNITY COMPANY; and LEAGUE GENERAL INSURANCE COMPANY,
Defendant, Appellants, Appellees and Cross-Appellees,

and

ALLSTATE INSURANCE COMPANY,
Defendant, Cross-Plaintiff, Cross-Appellant and Appellee,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Cross-Plaintiff and Appellee,

and

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, and RIVERSIDE INSURANCE COMPANY OF AMERICA,
Defendants and Appellees.

Supreme Court
Nos. 57916, 57935, 57934 and 57931

Civil Action
No. 73 248-068 CZ

ORDER

At a session of said Court held in the City-County Building, Detroit, Michigan, on the 13th day of February, 1979.

Present: HONORABLE HORACE W. GILMORE, *Circuit Court Judge.*

This matter having been remanded to the trial court for receipt of testimony and other evidence with respect to two specific issues, and

The parties having stipulated that evidence is not available on such issues in this proceeding and further stipulated that as to these two issues the complaint may be dismissed without prejudice to subsequent consideration of such issues in any appropriate proceeding,

IT IS ORDERED:

1. The complaint insofar as it presents the issue as to whether Section 3107 of the No-Fault Insurance Act, 1972 PA 294, violates the equal protection clauses of the Michigan and United States Constitutions, is dismissed without prejudice to subsequent consideration in any appropriate proceeding and without cost to either party.

2. The complaint so far as it presents the issue whether the provisions of the No-Fault Insurance Act, 72 PA 294, with respect to out-of-state motorists insurance coverage, being Section 3102(1), Section 3113, read inter alia with Section 3135 (2), violates either the due process or equal protection clauses of the United States or Michigan Constitutions, is dismissed without prejudice to subsequent presentation in any appropriate proceeding, without cost to either party.

/s/ HORACE W. GILMORE
Circuit Court Judge

A true copy James P. Killeen, Clerk.
By /s/ (Illegible)
Deputy Clerk

APPENDIX H.

SUMMARY OF THE ACT

Under the Act, owners and registrants of motor vehicles are required to purchase no-fault insurance. § 500.3101(1). Victims of motor vehicle accidents receive insurance benefits for many injuries without regard to "fault" in lieu of their common law tort remedies. §§ 500.3105-500.3108, 500.3121, 500.3131-500.3135. Persons who are rejected, cancelled or refused renewal by private insurers are eligible for coverage through the Automobile Placement Facility. § 500.3365(1). Every insurer authorized to write automobile insurance in Michigan must participate in this assigned risk pool. § 500.3301.

No statutory provision affects an insurer's decision to reject an applicant or refuse to renew a policy. An insurer may cancel an insured within 55 days after a policy takes effect whenever the risk is found unacceptable. § 500.3220(a). After 55 days, an insurer may cancel a policy only if the insured's drivers license (or the license of certain other customary operators of the insured vehicle) is suspended or revoked. § 500.3220(b). An insurer who cancels a policy after 55 days must notify the insured who then has an opportunity for a hearing by the Commissioner of Insurance after notice thereof at which both may be represented by counsel. §§ 500.3224-3244.

The statutory scheme guarantees insurance at rates which are not excessive, inadequate or unfairly discriminatory. §§ 500.3301(1)(a), 500.2403(1)(d). Proposed rates may be filed by insurance companies under either of two provisions. §§ 500.2406, 500.2430. Under both provisions the Commissioner of Insurance reviews the filings which become effective after the passage of time unless suspended or modified by the

Commissioner. §§ 500.2408, 500.2430(2). A filing under Section 2406 becomes effective after a maximum of 30 days. A Section 2430 filing is deemed effective after 15 days. §§ 500.2408(2), 500.2430(2). A party who wishes to challenge a rate may do so, after it takes effect, by applying to the Commissioner for a hearing. § 500.2420.

CHAPTER 24

CASUALTY INSURANCE RATES

Sec.

500.2400 Declaration of purpose of chapter, construction.

500.2401 Scope of chapter.

500.2403 Rate-making factors, standards, uniformity.

500.2406 Rate filings.
- (1) Filings by insurer on its own behalf.
- (2) Filings by licensed rating organization.

500.2408 Same; review and effective date of filings.
- (1) Review by commissioner.
- (2) Same; waiting period.
- (3) Special filing.

500-2410 Filing requirements; modification or suspension by commissioner.

500.2412 Same; adherence by insurer.

500.2414 Same; excess rates on specific risks.

500.2416 Disapproval of filing.
- (1) Notice of disapproval.
- (2) Same; effective special surety or guaranty filing.

500.2418 Same; after approval; procedure.

500.2420 Same; complaint of aggrieved person or organization.
(1) Application for hearing, notice, hearing.
(2) Order rendering filing ineffective.

500.2426 Manual of classifications, rule, rating plan; rates meeting standards.

500 2430 Same; alternative filing.
(1) Filing by insurer or rating organization, effective date, inspection.
(2) Disapproval; hearing, order.
(3) Same; adjustment of premium, review of filing.

500.2431 Workmen's compensation and group rated automobile insurance, applicability of alternative filing.

500.2436 Rating organization.

500.2438 Same; subscribers.
(1) Subscribership rules, notice of changes, furnishing of rating services.
(2) Subscribers; application of rules, admission, appeal.
(3) Same; admission, review.

500.2440 Same; rules affecting payment of dividends, savings or unabsorbed premiums.

500.2446 Same; cooperation with other rating organizations and insurers, discontinuance.

500.2450 Same; deviation from filings, procedure, termination of deviation.

500.2452 Same; alternative deviation, without waiting period, procedure, termination of deviation.

500.2456 Same; appeal to commissioner from action by organization.

500.2458 Same rating information to insured, appeal to commissioner.

500.2462 Advisory organization.
(1) Definition.
(2) Information filed.
(3) Discontinuance of unfair or unreasonable practices.
(4) Rate filings supported by violator advisory organization.

500.2464 Joint underwriting or reinsurance; unfair activities.

500.2468 Quinquennial examination.
(1) Rating, advisory organizations, joint underwriters and reinsurers, costs.
(2) Report of examination by insurance supervisory official of another state.

500.2472 Statistical plans, exchange of data, consultation.

500.2474 Information withheld; false or misleading information.

500.2476 Assigned risks; rate modifications.

500.2477 Professional liability insurers, submission and use of information.

500.2478 Violations, penalties, suspension or revocation of license.

500.2482 Order without hearing, hearing, court review.

500.2484 Rules and regulations.

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§ 500.2400 DECLARATION OF PURPOSE OF CHAPTER, CONSTRUCTION

Sec. 2400. The purpose of this chapter is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate co-operative action among insurers in rate making and in other matters within the scope

of the insurance code. Nothing in this chapter is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This chapter shall be liberally interpreted to carry into effect the provisions of this section. P.A.1956, No. 218, § 2400, Eff. Jan. 1, 1957.

§ 500.2401 SCOPE OF CHAPTER

Sec. 2401. (1) This chapter applies to the following kinds of insurance or coverages on risks or operations in this state:

(a) Surety and fidelity.

(b) Casualty insurance, as defined in section 624, except as to livestock insurance.

(c) Automobile insurance, as defined or included under the following sections:

(i) 624 (general definition of casualty insurance);

(ii) 6006 (insuring powers of domestic special automobile insurers (stock));

(iii) 6014 (insuring powers of domestic special automobile insurers (mutual));

(iv) 5814 (insuring powers of domestic general mutual insurers);

(v) 7202 (insuring powers of reciprocal insurers);

(vi) 620 (automobile insurance (limited) defined);

(vii) 614 (marine insurance defined);

(viii) 5814, subdivision (1) (definition of "fire insurance" in insuring powers of domestic general mutual insurers).

(d) When transacted by general mutual insurers, to the following insurances as defined in section 5814:

(i) Liability;

(ii) Steam boiler;

(iii) Use and occupancy;

(iv) Miscellaneous.

(e) To all insurances transacted by a reciprocal insurer pursuant to section 7202 (insuring powers of reciprocal insurers).

(f) Personal property floaters.

(g) Title insurance.

(2) Except, that this chapter shall not apply to:

(a) Reinsurance, other than joint reinsurance to the extent stated in section 2464;

(b) Disability insurance;

(c) Insurance against loss of or damage to aircraft or against liability, other than workmen's compensation and employers' liability, arising out of the ownership, maintenance or use of aircraft.

(3) The provisions of this chapter shall apply to all classes of insurers admitted to do business in this state, including stock, mutual, reciprocal and interinsurers authorized to write any of the kinds of insurance to which this chapter applies under any section of this insurance code.

(4) If any kind of insurance, subdivision or combination thereof, or type of coverage, subject to this chapter, is also subject to regulation by another rate regulatory chapter of this code, an insurer to which both chapter 24 and chapter 26 are otherwise applicable shall file with the commissioner, a designation as to which rate regulatory chapter shall be applicable to it with respect to such kind of insurance, subdivision or combination thereof, or type of coverage. P.A.1956, No. 218, § 2401, Eff. Jan. 1, 1957, as amended P.A.1966, No. 221, § 1, Imd. Eff. July 11, 1966.

§ 500.2403 RATE-MAKING FACTORS, STANDARDS, UNIFORMITY

Sec. 2403. (1) All rates shall be made in accordance with the following provisions:

(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, to underwriting practice, judgment, and to all other relevant factors within and outside this state.

(b) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

(c) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which measure variations in hazards or expense provisions, or both. Such rating plans may measure any differences among risks that may have a probable effect upon losses or expenses as provided for in subdivision (a).

(d) Rates shall not be excessive, inadequate or unfairly discriminatory. A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist with respect to the classification, kind or type of risks to which the rate is applicable. A rate shall not be held to be inadequate unless the rate is unreasonably low for the insurance coverage provided and the continued use of the rate endangers the solvency of the insurer; or unless the rate

is unreasonably low for the insurance provided and the use of the rate has or will have the effect of destroying competition among insurers, creating a monopoly or causing a kind of insurance to be unavailable to a significant number of applicants who are in good faith entitled to procure such insurance through ordinary methods.

(2) Except to the extent necessary to meet the provisions of subdivision (d) of subsection (1), uniformity among insurers in any matters within the scope of this section is neither required nor prohibited. P.A.1956, No. 218, § 2403, Eff. Jan. 1, 1957, as amended P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.2406 Rate filings

Section. 2406. (1) *Filing by insurer on its own behalf.* Every insurer shall file with the commissioner every manual of classification, every manual of rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of this chapter, he shall within 10 days of such filing give written notice to such insurer to furnish the information upon which it supports such filing. The information furnished in support of a filing may include (a) the experience or judgment of the insurer or rating organization making the filing, (b) its interpretation of any statistical data it relies upon, (c) the experience of other insurers or rating organizations, or (d) any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

(2) *Filings by licensed rating organization.* An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which

makes such filings, and by filing with the commissioner a copy of its authorization of the rating organization to make such filings on its behalf. Nothing contained in this chapter shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization. P.A.1956, No. 218, § 2406, Eff. Jan. 1, 1957, as amended P.A.1970, No. 180, § 1, Imd. Eff. Aug. 3, 1970.

§ 500.2408 SAME; REVIEW AND EFFECTIVE DATE OF FILINGS

Sec. 2408. (1) *Review by commissioner.* The commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this chapter.

(2) *Same; waiting period.* Subject to the exception specified in subsection (3) of this section, each filing whether or not accompanied by supporting information shall be on file for a waiting period of 15 days before it becomes effective, which period may be extended by the commissioner for 1 additional period not to exceed 15 days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which he has reviewed to become effective before expiration of the wait ng period or any extension thereof. A filing whether or not accompanied by supporting information shall be deemed to meet the requirements of this chapter unless disapproved by the commissioner within the waiting period or extension thereof: Provided, That where a filing is not accompanied by supporting information and such information is required by the commissioner under subsection (1) of section 2406, such filing shall be deemed to meet the requirements of this chapter unless disapproved by the commissioner within 15 days after such information is furnished.

(3) *Special filing.* Any special filing with respect to a surety or guaranty bond required by law or by court or executive order or by order, rule or regulation of a public body, not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this chapter until such time as the commissioner reviews the filing and so long thereafter as the filing remains in effect. P.A.1956, No. 218, § 2408, Eff. Jan. 1, 1957.

§ 500.2410 FILING REQUIREMENTS; MODIFICATION OR SUSPENSION BY COMMSSIONER

Sec. 2410. Under such rules and regulations as he shall adopt the commissioner may, by written order, suspend or modify the requirement of filing as to any kind of insurance, subdivision or combination thereof, or as to classes of risks, the rates for which cannot practicably be filed before they are used. Such orders, rules and regulations shall be made known to insurers and rating organizations affected thereby. The commissioner may make such examination as he may deem advisable to ascertain whether any rates affected by such order meet the standards set forth in section 2403(1)(d) (rate standards). P.A.1956, No. 218, § 2410, Eff. Jan. 1, 1957.

§ 500.2412 SAME; ADHERENCE BY INSURER

Sec. 2412. No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in this chapter or in accordance with sections 2410 or 2414. P.A.1956, No. 218, § 2412, Eff. Jan. 1, 1957.

§ 500.2414 SAME; EXCESS RATES ON SPECIFIC RATES

Sec. 2414. Upon the written application of the insured, stating his reasons therefor, filed with and approved by the commissioner, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk. P.A. 1956,

No. 218, § 2414, Eff. Jan. 1, 1957, as amended P.A.1970, No. 180, § 1, Imd. Eff. Aug. 3, 1970.

§ 500.2416 DISAPPROVAL OF FILING

Sec. 2416. (1) *Notice of disapproval.* If within the waiting period or any extension thereof as provided in subsection (2) of section 2408, the commissioner finds that a filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing specifying therein what respects he finds such filing fails to meet the requirements of this chapter and stating that such filing shall not become effective.

(2) *Same; effective special surety or guaranty filing.* If within 30 days after a special surety or guaranty filing subject to subsection (3) of section 2408 has become effective, the commissioner finds that such filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing specifying therein in what respects he finds that such filing fails to meet the requirements of this chapter and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Said disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in said notice. P.A.1956, No. 218, § 2416, Eff. Jan. 1, 1957.

§ 500.2418 SAME; AFTER APPROVAL; PROCEDURE

Sec. 2418. If at any time subsequent to approval of any filing, either by act or order of the commissioner or by operation of law, the commissioner finds that a filing does not meet the requirements of this chapter, he shall, after a hearing held upon not less than 10 days' written notice, specifying the matters to be considered at such hearing, to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet

the requirements of this chapter, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to every insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order. P.A.1956, No. 218, § 2418, Eff. Jan. 1, 1957.

§ 500.2420 SAME; COMPLAINT OF AGGRIEVED PERSON OR ORGANIZATION

Sec. 2420. (1) *Application for hearing, notice, hearing.* Any person or organization aggrieved with respect to any filing which is in effect may make written application to the commissioner for a hearing thereon: Provided, however, That the insurer or rating organization that made the filing shall not be authorized to proceed under this section. Such application shall specify the grounds to be relied upon by the applicant. If the commissioner finds that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within 30 days after receipt of such application, hold a hearing upon not less than 10 days' written notice to the applicant and to every insurer and rating organization which made such filing.

(2) *Order rendering filing ineffective.* If, after such hearing, the commissioner finds that the filing does not meet the requirements of this chapter, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this chapter, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to the applicant and to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the

period set forth in said order. P.A.1956, No. 218, § 2420, Eff. Jan. 1, 1957.

§ 500.2426 MANUAL OF CLASSIFICATIONS, RULE, RATING PLAN; RATES MEETING STANDARDS

Sec. 2426. No manual of classifications, rule, rating plan, or any modification of any of the foregoing which measures variations in hazards or expense provisions, or both, and which has been filed pursuant to the requirements of this chapter shall be disapproved if the rates thereby produced meet the requirements of section 2403(1)(d) (rate standards). P.A.1956, No. 218, § 2426, Eff. Jan. 1, 1957.

§ 500.2430 SAME; ALTERNATIVE FILING

Sec. 2430. (1) *Filing by insurer or rating organization, effective date, inspection.* In lieu of the filing requirements of this chapter and as an alternative method of filing, any insurer or rating organization may file with the commissioner any manual of classification, rules or rates, any rating plan and every modification of any of the foregoing which it proposes to use, the filing to indicate the character and extent of the coverage contemplated. Every such filing under this section shall state the effective date thereof, shall take effect on said date, shall not be subject to any waiting period requirements, and shall be deemed to meet the requirements of section 2403(1)(d) (rate standards) A filing and any supporting information shall be open to public inspection, if the filing is not disapproved.

(2) *Disapproval; hearing, order.* At any time within 15 days from and after the date of any such filing, the commissioner may give written notice to the insurer or rating organization making such filing, specifying in what respect and to what extent he contends such filing fails to comply with the requirements of section 2403(1)(d) and fixing a date for hearing not

less than 10 days from the date of mailing of such notice. At such hearing the factors specified in section 2406(1) shall be considered. If the commissioner after hearing finds that the filing does not comply with the provisions of this chapter, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which such filing shall no longer be effective. Any order of disapproval under this section must be entered within 30 days of the date of the filing affected.

(3) *Same; adjustments of premium, review of filing.* In the event that no notice of hearing shall be issued within 15 days from the date of any such filing, the filing shall be deemed to be approved. If such filing shall be disapproved, the insuring provisions of any contract or policy issued prior to the time the order becomes effective shall not be affected. But if the commissioner disapproves such filing as not being in compliance with section 2403(1)(d) (rate standards), he may order an adjustment of the premium to be made with the policyholder either by refund or collection of additional premium, if the amount is substantial and equals or exceeds the cost of making the adjustment. The commissioner may thereafter review any such filing in the manner provided in sections 2418 and 2420, but if so reviewed, no adjustment of premium may be ordered. Sections 2406(2) (filing may be made by rating organization, 2408(1) (commissioner shall review filing as soon as reasonably possible), and 2412 (insurer must adhere to filing) shall be applicable to filings made under this section. P.A.1956, No. 218, § 2430, Eff. Jan. 1, 1957.

§ 500.2431 WORKMEN'S COMPENSATION AND GROUP AUTOMOBILE INSURANCE, APPLICABILITY OF ALTERNATIVE FILING

Sec. 2431. The provisions of section 2430 shall not apply to workmen's compensation insurance and group rated automobile

insurance. P.A.1956, No. 218, § 2431, added by P.A. 1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.2436 RATING ORGANIZATION

Sec. 2436. (1) A corporation, an unincorporated association, a partnership or an individual, whether located within or outside this state, may make application to the commissioner for license as a rating organization to make rates and insurance contract forms for such kinds of insurance or subdivisions thereof as are specified in its application and shall file therewith:

(a) A copy of its constitution, its articles of agreement or association or its certificate of incorporation, and of its bylaws and rules governing the conduct of its business.

(b) A list of its members and subscribers.

(c) The name and address of a resident of this state upon whom notices or orders of the commissioner or process affecting such rating organization may be served.

(d) A statement of its qualifications as a rating organization.

(2) If the commissioner finds that the applicant is competent, trustworthy, and otherwise qualified to act as a rating organization and that its constitution, articles of agreement or association or certificate of incorporation, and its bylaws and rules governing the conduct of its business conform to the requirements of law, he shall issue a license specifying the kinds of insurance or subdivisions thereof for which the applicant is authorized to act as a rating organization. Every application shall be granted or denied in whole or in part by the commissioner within 60 days of the date of its filing with him.

(3) The fee for the license shall be $25.00 which shall be in lieu of all other fees, licenses or taxes imposed by the state or any political subdivision thereof.

(4) Licenses issued pursuant to this section shall remain in force for 3 years from date of issuance unless suspended or revoked by the commissioner, after hearing upon notice, in

accordance with the provisions of section 2478, in the event the rating organization ceases to meet the requirements of this section.

(5) Every rating organization shall notify the commissioner promptly of every change in (a) its constitution, its articles of agreement or association or its certificate of incorporation, and its bylaws and rules governing the conduct of its business, (b) its list of members and subscribers and (c) the name and address of the resident of this state designated by it upon whom notices or orders of the commissioner or process affecting such rating organization may be served. P.A.1956, No. 218, § 2436, Eff. Jan. 1, 1957, as amended P.A.1970, No. 180, § 1, Imd. Eff. Aug. 3, 1970.

§ 500.2438 SAME; SUBSCRIBERS

Sec. 2438. (1) *Subscribership rules, notice of changes, furnishing of rating services.* Subject to rules and regulations which have been approved by the commissioner as reasonable, each rating organization shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance or subdivision thereof for which it is authorized to act as a rating organization. Notice of proposed changes in such rules and regulations shall be given to subscribers. Each rating organization shall furnish its rating services without discrimination to its members and subscribers.

(2) *Subscribers; application of rules, admission, appeal.* The reasonableness of any rule or regulation in its application to subscribers, or the refusal of any rating organization to admit an insurer as a subscriber, shall, at the request of any subscriber or any such insurer, be reviewed by the commissioner at a hearing held upon at least 10 days' written notice to such rating organization and to such subscriber or insurer. If the commissioner finds that such rule or regulation is unreasonable in its application to subscribers, he shall order that such rule or regulation shall not be applicable to subscribers.

(3) *Same; admission, review.* If the rating organization fails to grant or reject an insurer's application for subscribership within 30 days after it was made, the insurer may request a review by the commissioner as if the application had been rejected. If the commissioner finds that the insurer has been refused admittance to the rating organization as a subscriber without justification, he shall order the rating organization to admit the insurer as a subscriber. If he finds that the action of the rating organization was justified, he shall make an order affirming its action. P.A.1956, No. 218, § 2438, Eff. Jan. 1, 1957.

§ 500.2440 SAME; RULES AFFECTING PAYMENT OF DIVIDENDS, SAVINGS OR UNABSORBED PREMIUMS

Sec. 2440. No rating organization shall adopt any rule the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers. P.A.1956, No. 218, § 2440, Eff. Jan. 1, 1957.

§ 500.2446 SAME; COOPERATION WITH OTHER RATING ORGANIZATIONS AND INSURERS, DISCONTINUANCE

Sec. 2446. Cooperation among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this chapter is hereby authorized, provided the filings resulting from such cooperation are subject to all the provisions of this chapter which are applicable to filings generally. The commissioner may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, and requiring the discontinuance of such activity or practice. P.A.1956, No. 218, § 2446, Eff. Jan. 1, 1957.

§ 500.2450 SAME; DEVIATION FROM FILINGS, PROCEDURE, TERMINATION OF DEVIATION

Sec. 2450. (1) Every member of or subscriber to a rating organization shall adhere to the filings made on its behalf by such organization except that any such insurer may make written application to the commissioner to file a deviation from the class rates, schedules, rating plans or rules respecting any kind of insurance, or class of risk within a kind of insurance, or combination thereof. Such application shall specify the basis for the modification and a copy shall also be sent simultaneously to such rating organization. In considering the application to file such deviation the commissioner shall give consideration to the available statistics and the principles for rate making provided in section 2403. The commissioner shall issue an order permitting the deviation for such insurer to be filed if he finds it to be justified and it shall thereupon become effective. He shall issue an order denying such application if he finds that the deviation applied for does not meet the requirements of this chapter.

(2) Each deviation permitted to be filed shall remain in effect for a period of not less than 1 year from the effective date unless sooner withdrawn by the insurer with the approval of the commissioner or until terminated in accordance with the provisions of sections 2418 or 2420. P.A.1956, No. 218, § 2450, Eff. Jan. 1, 1957, as amended P.A.1964, No. 146, § 1, Eff. Aug. 28, 1964.

§ 500.2452 SAME; ALTERNATIVE DEVIATION, WITHOUT WAITING PERIOD, PROCEDURE, TERMINATION OF DEVIATION

Sec. 2452. (1) In lieu of the requirements of section 2450 for deviation and as an alternative method for deviation every member of or subscriber to a rating organization shall adhere to the filings made on its behalf by such organization except

that any such insurer may make application to the commissioner to file a deviation from the class rates, schedules, rating plans or rules respecting any kind of insurance, or class of risk within a kind of insurance, or combination thereof. Such application shall specify the basis for the modification and a copy shall also be sent simultaneously to such rating organization. Every such application shall become effective immediately as of the date filed with the commissioner. In considering the application to file such deviation the commissioner shall give consideration to the available statistics and the principles for rate making provided in section 2403. The commissioner shall issue an order approving of the deviation as filed if he finds it meets the requirements of section 2403. If the commissioner finds that the deviation does not comply with the requirements of this chapter, he may issue an order determining wherein and to what extent such proposal is deemed to be improper and fixing a date thereafter, within a reasonable time, after which such deviation shall no longer be effective. Any order of disapproval under this section must be entered within 30 days of the date of the application for the deviation affected is filed with the commissioner. If such deviation shall be disapproved, the insuring provisions of any contract or policy issued prior to the time the order becomes effective shall not be affected. But if the commissioner disapproves such deviation as not being in compliance with section 2403, he may order an adjustment of the premium to be made with the policyholder either by refund or collection of additional premium, if the amount is substantial and equals or exceeds the cost of making the adjustment.

(2) Each deviation filed and so approved shall remain in effect for a period of not less than 1 year from the effective date unless sooner withdrawn by the insurer with the approval of the commissioner or until terminated in accordance with the provisions of sections 2418 or 2420. P.A. 1956, No. 218, § 2452, Eff. Jan. 1, 1957, as amended P.A.1964, No. 146, § 1, Eff. Aug. 28, 1964.

§ 500.2456 SAME; APPEAL TO COMMISSIONER FROM ACTION BY ORGANIZATION

Sec. 2456. (1) Any member of or subscriber to a rating organization may appeal to the commissioner from the action or decision of such rating organization in approving or rejecting any proposed change in or addition to the filings of such rating organization and the commissioner shall, after a hearing held upon not less than 10 days' written notice to the appellant and to such rating organization, issue an order approving the action or decision of such rating organization or directing it to give further consideration to such proposal, or, if such appeal is from the action or decision of the rating organization in rejecting a proposed addition to its filings, he may, in the event he finds that such action or decision was unreasonable, issue an order directing the rating organization to make an addition to its filing, on behalf of its members and subscribers, in a manner consistent with his findings, within a reasonable time after the issuance of such order.

(2) If such appeal is based upon the failure of the rating organization to make a filing on behalf of such member or subscriber which is based on a system of expense provisions which differs, in accordance with the right granted in section 2403 (1)(b) from the system of expense provisions included in a filing made by the rating organization, the commissioner shall, if he grants the appeal, order the rating organization to make the requested filing for use by the appellant. In deciding such appeal the commissioner shall apply the standards set forth in section 2403. P.A.1956, No. 218, § 2456, Eff. Jan. 1, 1957.

§ 500.2458 SAME; RATING INFORMATION TO INSURED, APPEAL TO COMMISSIONER

Sec. 2458. Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment of such

reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate. Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject such request within 30 days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within 30 days after written notice of such action, appeal to the commissioner, who, after a hearing held upon not less than 10 days' written notice to the appellant and to such rating organization or insurer, may affirm or reverse such action. P.A.1956, No. 218, § 2458, Eff. Jan. 1, 1957.

§ 500.2462 Advisory organization

Sec. 2462. (1) *Definition.* Every group, association or other organization of insurers, whether located within or outside this state, which assists insurers which make their own filings or rating organizations in rate making, by the collection and furnishing of loss or expense statistics, or by the submission of recommendations, but which does not make filings under this chapter, shall be known as an advisory organization.

(2) *Information filed.* Every advisory organization shall file with the commissioner.

(a) A copy of its constitution, its articles of agreement or association or its certificate of incorporation and of its bylaws, rules and regulations governing its activities,

(b) A list of its members,

(c) The name and address of a resident of this state upon whom notices or orders of the commissioner or process issued at his direction may be served, and

(d) An agreement that the commissioner may examine such advisory organization in accordance with the provisions of section 2468.

(3) *Discontinuance of unfair or unreasonable practices.* If, after a hearing, the commissioner finds that the furnishing of such information or assistance involves any act or practice which is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, he may issue a written order specifying in what respects such act or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, and requiring the discontinuance of such act or practice.

(4) *Rate filings supported by violator advisory organization.* No insurer which makes its own filings nor any rating organization shall support its filings by statistics or adopt rate making recommendations, furnished to it by an advisory organization which has not complied with this section or with an order of the commissioner involving such statistics or recommendations issued under subsection (3) of this section. If the commissioner finds such insurer or rating organization to be in violation of this subsection he may issue an order requiring the discontinuance of such violation. P.A.1956, No. 218, § 2462, Eff. Jan. 1, 1957.

§ 500.2464 Joint underwriting or reinsurance; unfair activities

Sec. 2464. (1) Every group, association or other organization of insurers which engages in joint underwriting or joint reinsurance, shall be subject to regulation with respect thereto as herein provided, subject, however, with respect to joint underwriting, to all other provisions of this chapter and, with respect to joint reinsurance, to sections 2468 (examination), 2478 (penalties), and 2482 (appeals).

(2) If, after a hearing, the commissioner finds that any activity or practice of any such group, association or other organization is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, and requiring the discontinuance of such activity or practice. P.A.1956, No. 218, § 2464, Eff. Jan. 1, 1957.

§ 500.2468 Quinquennial examination

Sec. 2468. (1) *Rating, advisory organizations, joint underwriters and reinsurers, costs.* The commissioner shall, at least once in 5 years, make or cause to be made an examination of each rating organization licensed in this state as provided in section 2436 and he may, as often as he may deem it expedient, make or cause to be made an examination of each advisory organization referred to in section 2462 and of each group, association or other organization referred to in section 2464. The reasonable costs of any such examination shall be paid by the rating organization, advisory organization, or group, association or other organization examined upon presentation to it of a detailed account of such costs. The officer, manager, agents and employees of such rating organization, advisory organization, or group, association or other organization may be examined at any time under oath and shall exhibit all books, records, accounts, documents, or agreements governing its method of operation. Any such examination shall be subject to the procedure provided for in section 222, relating to examinations of insurance companies.

(2) *Report of examination by insurance supervisory official of another state.* In lieu of any such examination the commissioner may accept the report of an examination made by the insurance supervisory official of another state, pursuant to the laws of such state. P.A.1956, No. 218, § 2468, Eff. Jan. 1, 1957.

§ 500.2472 Statistical plans, exchange of data, consultation

Sec. 2472. (1) The commissioner shall promulgate reasonable rules and statistical plans, reasonably adapted to each of the rating systems on file with him, which may be modified from time to time and which shall be used thereafter to the extent applicable to its particular rating system or systems, by each insurer in the recording and reporting of its loss and countrywide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid him in determining whether rating systems comply with the standards set forth in section 2403. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and are not susceptible of determination by a prorating of countrywide expense experience. In promulgating such rules and plans, the commissioner shall give due consideration to the rating systems on file with him and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans used for such rating systems in other states. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system filed by it and no insurer shall be required to record or report its loss or expense experience on any basis or statistical plan that differs from that which is regularly employed and maintained in the usual course of such insurer's business, or to any rating organization or agency of which it is not a member or subscriber. The commissioner may designate 1 or more rating organizations or other agencies to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the commissioner, to insurers and rating organizations.

(2) Reasonable rules and plans may be promulgated by the commissioner for the interchange of data necessary for the application of rating plans.

(3) In order to further uniform administration of rate regulatory laws, the commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult with them with respect to rate making and the application of rating systems. P.A.1956, No. 218, § 2472, Eff. Jan. 1, 1957.

§ 500.2474 Information withheld; false or misleading information

Sec. 2474. No person or organization shall wilfully withhold information from, or knowingly give false or misleading information to, the commissioner, any statistical agency designated by the commissioner, any rating organization, or any insurer, which will affect the rates or premiums chargeable under this chapter. A violation of this section shall subject the person or organization guilty of such violation to the penalties provided in section 2478. P.A.1956, No. 218, § 2474, Eff. Jan. 1, 1957.

§ 500.2476 Assigned risks; rate modifications

Sec. 2476. Agreements may be made among insurers with respect to the equitable apportionment among them of insurance which may be afforded applicants who are in good faith entitled to but who are unable to procure such insurance through ordinary methods and such insurers may agree among themselves on the use of reasonable rate modifications for such insurance, such agreements and rate modifications to be subject to the approval of the commissioner. P.A.1956, No. 218, § 2476, Eff. Jan. 1, 1957.

§ 500.2477 Professional liability insurers, submission and use of information

Sec. 2477. (1) Every insurer providing professional liability insurance to a person licensed by the medical practice board, the board of osteopathic registration and examination, the board of podiatry, the board of dentistry, and the hospitals licensed by the department of public health in this state shall submit the following data at the times prescribed to the state insurance commissioner. All data shall be provided with respect to any complaint filed against such insured in any court, if the complaint seeks damages for personal injury claimed to have been caused by the negligence of the insured relating to the insured's professional services, or the performance of professional services by the insured without consent or informed consent, or a breach of warranty or contract for a medical result relating to the insured's professional services.

(2) The following data and information shall be furnished to the commissioner within 30 days of the filing of an answer on behalf of the insured:

(a) The name of such insured.

(b) The policy number.

(c) The policy limits.

(d) A copy of the complaint.

(e) A copy of the answer filed on behalf of the insured.

(f) To the extent the insurer has knowledge, the name of any other insurer providing professional liability coverage with respect to the case, whether excess coverage or otherwise, including the other insurer's policy number and limits or liability, if known.

(3) The following data and information shall be furnished to the commissioner within 30 days from any judgment, settlement, or other dismissal involving the insured;

(a) The date of any judgment, settlement, or other dismissal.

(b) Whether any appeal has been taken and by which party.

(c) The amount of any judgment against the insured.

(d) The amount of any settlement paid on behalf of the insured, whether such settlement was negotiated by suit or without the filing of a complaint for damages.

(e) In the event consideration was not paid on behalf of the insured and a judgment of no cause for action was not entered, the reason for any dismissal.

(f) Any such other information as the commissioner may require.

(4) The insurance commissioner shall retain the information and maintain the files in the form and for a period as he shall determine necessary in his sole discretion. The commissioner shall maintain the data and information filed in accordance with this section as confidential records and shall release the same only for bona fide research, educational or legislative purposes, or as required by subsection (6) except that the name of the insurer shall be omitted. The commissioner in his sole discretion shall determine the validity of any request for the information.

(5) There shall be no liability on the part of and a cause of action of any nature shall not arise against an insurer reporting hereunder or its agents or employees, or the commissioner or his representatives, for any action taken by them pursuant to this section.

(6) The insurance commissioner shall, within 30 days of receipt, submit in writing to the Michigan medical practice board, the board of osteopathic registration and examination, the board of podiatry, the board of dentistry, or the hospitals licensed by the department of public health, the data and information furnished to the commissioner pursuant to subsection

(3) but only that which is relevant to that board or agency. For the purpose of providing information to the medical practice board, the board of osteopathic registration and examination, the board of podiatry, the board of dentistry or the hospitals licensed by the department of public health, the name of the insurer will be provided for only this purpose. P.A.1956, No. 218, § 2477, added by P.A.1975, No. 44, § 1, Imd. Eff. May 12, 1975.

§ 500.2478 Violations, penalties, suspension or revocation of license

Sec. 2478. (1) The commissioner may, if he finds that any person or organization has violated the provisions of this chapter, previous to the date of his finding, impose a penalty of not to exceed $25.00 for such violations and if such violations be wilful he may impose a penalty of not more than $500.00. No penalty shall be imposed for an offense that was committed more than 12 months prior to the date of the commissioner's findings.

(2) The commissioner may suspend the license of any rating organization or insurer which fails to comply with an order of the commissioner within the time limited by such order, or any extension thereof which the commissioner may grant but such suspension shall not affect the validity or continued effectiveness of rates theretofore filed and effective. The commissioner shall not suspend the license of any rating organization or insurer for failure to comply with an order until the time prescribed for an appeal therefrom has expired or if an appeal has been taken, until such order has been affirmed. The commissioner may determine when a suspension of license shall become effective and it shall remain in effect for the period fixed by him, unless he modifies or rescinds such suspension, or until the order upon which such suspension is based is modified, rescinded or reversed.

(3) No penalty shall be imposed and no license shall be suspended or revoked except upon a written order of the commis-

sioner, stating his findings, made after a hearing held upon not less than 10 days' written notice to such person or organization specifying the alleged violation. P.A.1956, No. 218, § 2478, Eff. Jan. 1, 1957.

§ 500.2482 ORDER WITHOUT HEARING, HEARING, COURT REVIEW

Sec. 2482. (1) Any insurer or rating organization aggrieved by any order or decision of the commissioner made without a hearing, may within 30 days after notice of the order to the insurer or organization, make written request to the commissioner for a hearing thereon. The commissioner shall hear such party or parties within 20 days after receipt of such request and shall give not less than 10 days' written notice of the time and place of the hearing. Within 15 days after such hearing the commissioner shall affirm, reverse or modify his previous action, specifying his reasons therefor. Pending such hearing and decision thereon the commissioner may suspend or postpone the effective date of his previous action.

(2) Any order or decision of the commissioner shall be subject to review in accordance with the provisions of section 244, but no order or decision appealed from as herein provided shall become effective or be enforced pending final disposition of such appeal. P.A.1956, No. 218, § 2482, Eff. Jan. 1, 1957.

§ 500.2484 RULES AND REGULATIONS

Sec. 2484. The commissioner may make reasonable rules and regulations necessary to effect the purposes of this chapter. P.A.1956, No. 218, § 2484, Eff. Jan. 1, 1957.

CHAPTER 31

PERSONAL AND PROPERTY PROTECTION AND RESIDUAL LIABILITY INSURANCE

Sec.

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§ 500.3101 SECURITY FOR PAYMENT OF BENEFITS UNDER PERSONAL AND PROPERTY PROTECTION AND RESIDUAL LIABILITY INSURANCE, NECESSITY, FORM, APPROVAL; DEFINITIONS, MOTOR VEHICLE, INSURER

Sec. 3101. (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle.

(2) "Motor vehicle" as used in this chapter, except for section 3103[1]; means a vehicle, including a trailer, operated or designed for operation upon a public highway by power

other than muscular power which has more than 2 wheels, but does not include a moped as defined in section 32b of Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan Compiled Laws.

(3) Security may be provided under a policy issued by an insurer duly authorized to transact business in this state which affords insurance for the payment of such benefits. A policy of insurance represented or sold as providing security shall be deemed to provide insurance for the payment of the benefits.

(4) Security may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the registration period. The person filing the security has all the obligations and rights of an insurer under this chapter. When the context permits, "insurer" as used in this chapter, includes any person filing the security as provided in this section. P.A. 1956, No. 218, § 3101, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973. Amended by P.A.1975, No. 329, § 1; P.A.1977, No. 54, § 1, Imd. Eff. July 6.

1. Section 500.3103.

§ 500.3102 SECURITY FOR PAYMENT OF BENEFITS, MOTOR VEHICLES NOT REGISTERED BUT OPERATED IN STATE; OPERATION WITHOUT SECURITY, OFFENSES, PENALTIES

Sec. 3102. (1) A nonresident owner or registrant of a motor vehicle not registered in this state shall not operate or permit the vehicle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he continuously maintains security for the payment of benefits.

(2) An owner or registrant of a motor vehicle with respect to which security is required who operates the motor vehicle or permits it to be operated upon a public highway in this state

without having in full force and effect security complying with this section or section 3101[1] or 3103[2] is guilty of a misdemeanor. Any other person who operates a motor vehicle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall have his license and, if an owner or registrant, his registration revoked and may be fined not less than $100.00 nor more than $500.00 or imprisoned for not more than 1 year or both. P.A.1956, No. 218, § 3102, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973, as amended P.A.1975, No. 329, § 1, Eff. March 31, 1976.

1. Section 500.3101.
2. Section 500.3103.

§ 500.3103 Motor vehicles with two wheels, security requirements

Sec. 3103. An owner or registrant of a motor vehicle with 2 wheels, except a moped, shall provide security against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by a person arising out of the ownership, maintenance, or use of that motor vehicle. The security shall conform with the requirements of section 3009(1)[1]. P.A.1956, No. 218, § 3103, added by P.A.1975, No. 329, § 1; P.A.1977, No 54, § 1, Imd. Eff. July 6.

1. Section 500.3009(1).

§ 500.3105 Personal protection benefits, existence, no fault; definitions, bodily injury, accidental injury

Sec. 3105. (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of ownership, operation, maintenance or use of a motor

vehicle as a motor vehicle, subject to the provisions of this chapter.

(2) Personal protection insurance benefits are due under this chapter without regard to fault.

(3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury.

(4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself. P.A.1956, No. 218, § 3105, added by P.A. 1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3106 Parked motor vehicles, accidental bodily injury

Sec. 3106. Accidental bodily injury does not arise out of the ownership, operation, maintenance or use of a parked vehicle as a motor vehicle unless any of the following occur:

(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

(b) The injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used or property being lifted onto or lowered from the vehicle in the loading or unloading process.

(c) The injury was sustained by a person while occupying, entering into or alighting from the vehicle. P.A.1956, No. 218, § 3106, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3107 Personal protection insurance benefits, allowable expenses, work loss

Sec. 3107. Personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except when the injured person requires special or intensive care, or charges for funeral and burial expenses in excess of $1,000.00.

(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he had not been injured and expenses not exceeding $20.00 per day, resonably incurred in obtaining ordinary and necessary services in lieu of those that, if he had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or of his dependent. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his claim reasonable proof of a lower value of the income tax advantage in his case, in which case the lower value shall apply. The benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. The maximum

shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum. P.A.1956, No. 218, § 3107, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3107a Work loss basis

Sec. 3107a. Subject to the provisions of section 3107(b),[1] work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident. P.A.1956, No. 218, § 3107a, added by P.A.1975, No. 311, § 1, Imd. Eff. Dec. 22, 1975.

1. Section 500.3107(b).

§ 500.3108 Survivors' loss, personal protection benefits, scope, maximum benefits

Sec. 3108. Personal protection insurance benefits are payable for a survivors' loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of his death would have received for support during their dependency from the deceased if he had not suffered the accidental bodily injury causing death and expenses, not exceeding $20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if he had not suffered the injury causing death. The benefits payable for survivors' loss in connection with the death of a person in a single 30-day period shall not exceed $1,000.00 and is not payable beyond the first 3 years after the date of the accident. P.A.1956, No. 218, § 3108, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3109 DEDUCTIONS FROM PERSONAL PROTECTION BENEFITS, STATE OR FEDERAL BENEFITS; INJURED PERSON, DEFINITION; DEDUCTIBLE COVERAGE PROVISIONS, PERSONAL PROTECTION BENEFITS

Sec. 3109. (1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury.

(2) An injured person is a natural person suffering accidental bodily injury.

(3) An insurer providing personal protection insurance benefits may offer, at appropriately reduced premium rates, a deductible of a specified dollar amount which does not exceed $300.00 per accident. This deductible may be applicable to all or any specified types of personal protection insurance benefits but shall apply only to benefits payable to the person named in the policy, his spouse and any relative of either domiciled in the same household. Any other deductible provisions require the prior approval of the commissioner. P.A.1956, No. 218, § 3109, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3109a DEDUCTIBLES AND EXCLUSIONS RELATING TO OTHER HEALTH AND ACCIDENT COVERAGE

Sec. 3109a. An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy the spouse of the insured and any relative of either domiciled in the same household. P.A.1956, No. 218, § 3109a, added by P.A.1974, No. 72, § 1, Eff. June 3, 1974.

§ 500.3110 DEPENDENTS OF DECEASED PERSON, PRESUMPTIONS, FACT QUESTIONS; TERMINATION OF DEPENDENCE; ACCRUAL OF PERSONAL PROTECTION BENEFITS

Sec. 3110. (1) The following persons are conclusively presumed to be dependents of a deceased person:

(a) A wife is dependent on a husband with whom she lives at the time of his death.

(b) A husband is dependent on a wife with whom he lives at the time of her death.

(c) A child while under the age of 18 years, or over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he lives or from whom he received support regularly at the time of the death of the parent.

(2) In all other cases, questions of dependency and the extent of dependency shall be determined in accordance with the facts as they exist at the time of death.

(3) The dependency of a surviving spouse terminates upon death or remarriage. The dependency of any other person terminates upon the death of the person and continues only so long as the person is under the age of 18 years, physically or mentally incapacitated from earning, or engaged full time in a formal program of academic or vocational education or training.

(4) Personal protection insurance benefits for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred. P.A.1956, No. 218, § 3110, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3111 Accidents occurring out of state, personal protection benefits

Sec. 3111. Personal protection insurance benefits are payable for accidental bodily injury suffered in an accident occurring out of this state, if the accident occurs within the United States, its territories and possessions or in Canada, and the person whose injury is the basis of the claim was at the time of the accident a named insured under a personal protection insurance policy, his spouse, a relative of either domiciled in the same household or an occupant of a vehicle involved in the accident whose owner or registrant was insured under a personal protection insurance policy or has provided security approved by the secretary of state under subsection (4) of section 3101.[1] P.A.1956, No. 218, § 3111, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3101.

§ 500.3112 Payees of personal protection benefits; payments as discharge of liability

Sec. 3112. Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:

(a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.

(b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse. P.A.1956, No. 218, § 3112, added by P.A. 1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3113 Persons not entitled to personal protection benefits

Sec. 3113. A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

(a) The person was using a motor vehicle which he had taken unlawfully, unless he reasonably believed that he was entitled to take and use the vehicle.

(b) The person was the owner or registrant of a motor vehicle involved in the accident with respect to which the security required by subsections (3) and (4) of section 3101[1] was not in effect.

(c) The person was not a resident of this state, was an occupant of a motor vehicle not registered in this state and was not insured by an insurer which has filed a certification in compliance with section 3163.[2] P.A.1956, No. 218, § 3113, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3101.
2. 500.3163.

§ 500.3114 Persons entitled to personal protection benefits; insurer providing coverage

Sec. 3114. (1) *Named insured, spouse, relatives; multiple policies, recoupment.* Except as provided in subsections (2)

and (3), a personal protection insurance policy applies to accidental bodily injury to the person named in the policy, his spouse and a relative of either domiciled in the same household. When personal protection insurance benefits are payable to or for the benefit of an injured person under his own policy and would also be payable under the policy of his spouse, relative or relative's spouse, the injured person's insurer shall pay all of the benefits and shall not be entitled to recoupment from the other insurer.

(2) *Operators or passengers, motor vehicles transporting passengers.* A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance bnefits to which the person is entitled from the insurer of the motor vehicle. This subsection shall not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:

(a) A school bus, as defined by the department of education, providing transportation not prohibited by law.

(b) A bus operated by a common carrier of passengers certified by the public service commission.

(c) A bus operating under a government sponsored transportation program.

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in section 3101 or 3102.[1]

(3) *Employee, his spouse or relatives occupying employer's motor vehicle.* An employee, his spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive personal protection insurance

benefits to which the employee is entitled from the insurer of the furnished vehicle.

(4) *Personal protection benefit claims against several insurers, priority.* Except as provided in subsections (1) to (3), a person suffering accidental bodily injury while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the vehicle occupied.

(b) The insurer of the operator of the vehicle occupied.

P.A.1956, No. 218, § 3114, added by P.A.1972, No. 294, § 1; Amended P.A.1975, No. 137, § 1; P.A.1976, No. 356, § 1; P.A.1977, No. 53, § 1, Imd. Eff. July 5.

1. Sections 500.3101, 500.3102.

§ 500.3115 Distribution of loss among personal protection insurers; benefit limits, determination

Sec. 3115. (1) Except as provided in subsection (1) of section 3114,[1] a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) Insurers of owners or registrants of motor vehicles involved in the accident.

(b) Insurers of operators of motor vehicles involved in the accident.

(2) When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers.

(3) A limit upon the amount of personal protection insurance benefits available because of accidental bodily injury to 1 person arising from 1 motor vehicle accident shall be determined without regard to the number of policies applicable to the accident. P.A.1956, No. 218, § 3115, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3114.

§ 500.3116 Reimbursement and indemnification among personal protection insurers; tort claims

Sec. 3116. (1) A subtraction from personal protection insurance benefits shall not be made because of the value of a claim in tort based on the same accidental bodily injury. However, after recovery is realized upon a tort claim, a subtraction shall be made to the extent of the recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If personal protection insurance benefits have already been received, the claimant shall repay to the insurers out of the recovery a sum equal to the benefits received, but not more than the recovery exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. The insurer shall have a lien on the recovery to this extent. A recovery by an injured person or his estate for loss suffered by him shall not be subtracted in calculating benefits due a dependent after the death and a recovery by a dependent for loss suffered by the dependent after the death shall not be subtracted in calculating benefits due the injured person.

(2) A personal protection insurer with a right of reimbursement under subsection (1), if suffering loss from inability to collect reimbursement out of a payment received by a claimant upon a tort claim is entitled to indemnity from a person who, with notice of the insurer's interest, made such a payment to the claimant without making the claimant and the insurer joint payees as their interests may appear or without obtaining the insurer's consent to a different method of payment. P.A.1956, No. 218, § 3116, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3121 Property protection benefits, existence, no fault; definitions, property damage, accidental damage; measure of benefits; maximum benefits

Sec. 3121. (1) Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125 and 3127.[1]

(2) Property protection insurance benefits are due under the conditions stated in this chapter without regard to fault.

(3) Damage to tangible property consists of physical injury to or destruction of the property and loss of use of the property so injured or destroyed.

(4) Damage to tangible property is accidental, as to a person claiming property protection insurance benefits, unless it is suffered or caused intentionally by the claimant. Even though a person knows that damage to tangible property is substantially certain to be caused by his act or omission, he does not cause or suffer such damage intentionally if he acts or refrains from acting for the purpose of averting injury to any person, including himself, or for the purpose of averting damage to tangible property.

(5) Property protection insurance benefits consist of the lesser of reasonable repair costs or replacement costs less depreciation and, where applicable, the value of loss of use. However, property protection insurance benefits paid under 1 policy for damage to all tangible property arising from 1 accident shall not exceed $1,000,000.00. P.A.1956, No. 218, § 3121, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Sections 500.3123, 500.3125, 500.3127.

§ 500.3123 PROPERTY DAMAGE, EXCLUSIONS FROM COVERAGE

Sec. 3123. (1) Damage to the following kinds of property is excluded from property protection insurance benefits:

(a) Vehicles and their contents, including trailers, operated or designed for operation upon a public highway by power other than muscular power, unless the vehicle is parked in such a way as not to cause unreasonable risk of the damage which occurred.

((b) Property owned by a person named in a property protection insurance policy, his spouse or a relative of either domiciled in the same household, if the person named, his spouse or the relative was the owner, registrant or operator of a vehicle involved in the motor vehicle accident out of which the property damage arose.

(2) Property protection insurance benefits are not payable for property damage arising from motor vehicle accidents occurring out of this state. P.A.1956, No. 218, § 3123, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3125 PROPERTY PROTECTION BENEFIT CLAIMS AGAINST SEVERAL INSURERS, PRIORITY

Sec. 3125. A person suffering accidental property damage shall claim property protection insurance benefits from insurers in the following order of priority: insurers of owners or registrants of vehicles involved in the accident; and insurers of operators of vehicles involved in the accident. P.A.1956, No. 218, § 3125, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3127 DISTRIBUTION OF LOSS, REIMBURSEMENT, AND INDEMNIFICATION AMONG PROPERTY PROTECTION INSURERS

Sec. 3127. The provisions for distribution of loss and for reimbursement and indemnification among personal protection

insurers as set forth in subsection (2) of section 3115[1] and in section 3116[2] also applies to property protection insurers. P.A.1956, No. 218, § 3127, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3115.
2. Section 500.3116.

§ 500.3131 RESIDUAL LIABILITY COVERAGE, EXISTENCE, SCOPE

Sec. 3131. Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions or in Canada. This insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135.[1] P.A.1956, No. 218, § 3131, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3135.

§ 500.3135 TORT LIABILITY FOR NONECONOMIC LOSS, EXISTENCE, EXTENT; TORT LIABILITY FROM OWNERSHIP, MAINTENANCE, OR USE OF MOTOR VEHICLE, ABOLISHMENT, EXCEPTIONS

Sec. 3135. (1) A person remains subject to tort liability for noneconomic loss caused by his ownership, maintenance or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement.

(2) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance or use within this state of a motor vehicle with respect to which the security required by subsections (3) and (4) of section 3101[1] was in effect is abolished except as to:

(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his act or omission, he does not cause or suffer such harm intentionally if he acts or refrains from acting for the purpose of averting injury to any person, including himself, or for the purpose of averting damage to tangible property.

(b) Damages for noneconomic loss as provided and limited in subsection (1).

(c) Damages for allowable expenses, work loss and survivor's loss as defined in sections 3107 to 3110[2] in excess of the daily, monthly and 3 year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his liability by the amount of taxes that would have been payable on account of income the injured person would have received if he had not been injured. P.A.1956, No. 218, § 3135, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3101.
2. Sections 500.3107-500.3110.

§ 500.3141 Notice of accident, necessity, time

Sec. 3141. An insurer may require written notice to be given as soon as practicable after an accident involving a motor vehicle with respect to which the policy affords the security required by this chapter. P.A.1956, No. 218, § 3141, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3142 Personal protection benefits, time payable, overdue payments, interest

Sec. 3142. (1) Personal protection insurance benefits are payable as loss accrues.

(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable

proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(3) An overdue payment bears simple interest at the rate of 12% per annum. P.A.1956, No. 218, § 3142, added by P.A. 1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3143 Agreement for assignments of future benefits, invalidity

Sec. 3143. An agreement for assignment of a right to benefits payable in the future is void. P.A.1956, No. 218, § 3143, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3145 Limitations as to actions for personal or property protection benefits; notice of injury

Sec. 3145. (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's

loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

(2) An action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident. P.A.1956, No. 218, § 3145, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3146 Limitations as to action by insurer for recovery or indemnity

Sec. 3146. An action by an insurer to enforce its rights of recovery or indemnity under section 3116[1] may not be commenced later than 1 year after payment has been received by a claimant upon a tort claim with respect to which the insurer has a right of reimbursement or recovery under section 3116. P.A.1956, No. 218, § 3146, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Section 500.3116.

§ 500.3148 Attorney's fees, authorization, charge against insurer, allowance to insurer; offset against benefits; judgement against claimant

Sec. 3148. (1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer

in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

(2) An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid. P.A.1956, No. 218, § 3148, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3151 Mental or physical conditions material to claim, examinations, policy provisions

Sec. 3151. When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits. P.A.1956, No. 218, § 3151, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3152 Reports as to mental or physical examinations, availability, contents, waiver of privilege

Sec. 3152. If requested by a person examined, a party causing an examination to be made shall deliver to him a copy of every written report concerning the examination rendered by an

examining physician, at least 1 of which reports shall set out his findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled upon request to receive from the person examined every written report available to him or his representative concerning any examination relevant to the claim, previously or thereafter made, of the same mental or physical condition, and the names and addresses of physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and shall authorize the insurer to inspect and copy records of physicians, hospitals, clinics or other medical facilities relevant to the claim. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege he may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition. P.A.1956, No. 218, § 3152, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3153 Refusal to submit to mental or physical examination or to make available reports of such examinations, court orders

Sec. 3153. A court may make such orders in regard to the refusal to comply with sections 3151 and 3152[1] as are just, except that an order shall not be entered directing the arrest of a person for disobeying an order to submit to a physical or mental examination. The orders that may be made in regard to such a refusal include, but are not limited to:

(a) An order that the mental or physical condition of the disobedient person shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.

(b) An order refusing to allow the disobedient person to support or oppose designated claims or defenses, prohibiting him from introducing evidence of mental or physical condition.

(c) An order rendering judgment by default against the disobedient person as to his entire claim or a designated part of it.

(d) An order requiring the disobedient person to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim.

(e) An order requiring delivery of a report, in conformity with section 3152, on such terms as are just, and if a physician fails or refuses to make the report a court may exclude his testimony if offered at trial. P.A.1956, No. 218, § 3153, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Sections 500.3151, 500.3152.

§ 500.3157 Charges for products, services, and accommodations in treating injured persons, authorization, amount

Sec. 3157. A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accomodations in cases not involving insurance. P.A.1956, No. 218, § 3157, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3158 STATEMENT OF EARNINGS, FORM, CONTENTS; REPORTS OF TREATMENT OF INJURED PERSONS; RECORDS, PRODUCTION, INSPECTION, COPYING

Sec. 3158. (1) An employer, when a request is made by a personal protection insurer against whom a claim has been made, shall furnish forthwith, in a form approved by the commissioner of insurance, a sworn statement of the earnings since the time of the accidental bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based.

(2) A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the history, condition, treatment and dates and costs of treatment of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment. P.A.1956, No. 218, § 3158, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3159 DISCOVERY AS TO EARNINGS, CONDITION, AND TREATMENT; ORDERS, CONDITIONS, REFUSAL; ATTORNEYS' FEES, COSTS, EXPENSES

Sec. 3159. In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or

oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires. P.A.1956, No. 218, § 3159, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3163 CERTIFICATION AS TO PROTECTION BY ADMITTED AND NONADMITTED INSURERS, NONRESIDENT MOTOR VEHICLE OWNERS AND OPERATORS, NECESSITY, AUTHORIZATION, EFFECT

Sec. 3163. (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, shall be subject to the personal and property protection insurance system set forth in this act.

(2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).

(3) When a certification filed under subsections (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage. P.A.1956, No. 218, § 3163, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

§ 500.3171 ASSIGNED CLAIMS FACILITY AND PLAN, ORGANIZATION, MAINTENANCE, PARTICIPATION, COSTS, RULES

Sec. 3171. The secretary of state shall organize and maintain an assigned claims facility and plan. A self-insurer and insurer writing insurance as provided by this chapter in this state shall participate in the assigned claims plan. Costs incurred in the operation of the facility and the plan shall be allocated fairly among insurers and self-insurers. The secretary of state shall promulgate rules to implement the facility and plan in accordance with the subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948 P.A.1956, No. 218, § 3171, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973, as amended P.A.1972, No. 345, § 1, Imd. Eff. Jan. 9, 1973.

§ 500.3172 PERSONAL PROTECTION INSURANCE BENEFITS THROUGH ASSIGNED CLAIMS PLAN, PREREQUISITES, COLLECTION OF BENEFITS, REIMBURSEMENT

Sec. 3172. A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, or the only identifiable personal protection insurance appliable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. In such case unpaid benefits due or coming due are subject to being collected under the assigned claims plan, and the insurer to which the claim is assigned, or the assigned claims facility if the claim is assigned to it, is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility. P.A.1956, No. 218, § 3172, added by

P.A.1972, No. 294, § 1, Eff. Oct. 1 1973, as amended P.A. 1972, No. 345, § 1, Imd. Eff. Jan. 9, 1973.

§ 500.3173 LIMITATIONS FOR EXCLUSIONS PREVENTING QUALIFICATIONS FOR PERSONAL PROTECTION BENEFITS UNDER ASSIGNED CLAIMS PLANS

Sec. 3171. A person who because of a limitation or exclusion in sections 3105 to 3116[1] is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan. P.A. 1956, No. 218, § 3173, added by P.A. 972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Sections 500.3105-500.3116.

§ 500.3174 NOTICE OF CLAIM THROUGH ASSIGNED CLAIMS PLAN, TIME; ASSIGNMENT OF CLAIM; NOTICE TO CLAIMANT; ACTION BY CLAIMANT, TIME

Sec. 3174. A person claiming through an assigned claims plan shall notify the facility of his claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned, or of the facility if the claim is assigned to it. An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later. P.A.1956, No. 218, § 3174, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973, as amended P.A.1972, No. 345, § 1, Imd. Eff. Jan. 9, 1973.

§ 500.3175 RULES FOR ASSIGNMENT OF CLAIMS, FAIR ALLOCATION OF BURDEN AMONG INSURERS; PAYMENT OF LOSS, TIME, REIMBURSEMENT; LOSS ADJUSTMENT COSTS; INDEMNITY OR REIMBURSEMENT RIGHTS AGAINST THIRD PARTIES

Sec. 3175. The assignment of claims shall be made according to rules that assure fair allocation of the burden of assigned claims among insurers doing business in this state on a basis reasonably related to the volume of automobile liability and personal protection insurance they write on motor vehicles or of the number of self-insured motor vehicles. An insurer to whom claims have been assigned shall make prompt payment of loss in accordance with this act and is thereupon entitled to reimbursement by the facility for the payments and the established loss adjustment cost. The insurer to whom claims have been assigned shall preserve and enforce rights to indemnity or reimbursement against third parties and account to the assigned claims facility therefor and shall assign such rights to the facility upon reimbursement by the facility. P.A.1956, No. 218, § 3175, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973, as amended by P.A. 1972, No. 345, § 1, Imd. Eff. Jan. 9, 1973.

§ 500.3176 ASSIGNED CLAIMS HANDLING AND DISPOSITION COSTS, RATES

Sec. 3176. Reasonable costs incurred in the handling and disposition of assigned claims, including amounts paid pursuant to assessments under section 3171, shall be taken into account in making and regulating rates for automobile liability and personal protection insurance. P.A.1956, No. 218, § 3176, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973, as amended P.A. 1972, No. 345, § 1, Imd. Eff. Jan. 9, 1973.

§ 500.3177 RECOVERY OF PERSONAL PROTECTION BENEFITS PAID TO OCCUPANT OF UNINSURED MOTOR VEHICLE OR SPOUSE OR RELATIVE OF OWNER OR REGISTRANT OF UNINSURED MOTOR VEHICLE; SUSPENSION OR REVOCATION OF MOTOR VEHICLE REGISTRATION AND OPERATOR'S LICENSE; UNINSURED MOTOR VEHICLE, DEFINITION

Sec. 3177. An insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person occupying an uninsured motor vehicle or to the spouse or relative resident in the household of the owner or registrant of an uninsured motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his estate. Failure of such a person to make payment within 30 days is a ground for suspension or revocation of his motor vehicle registration and operator's license. An uninsured motor vehicle for the purpose of this section is a motor vehicle with respect to which security as required by section 3101 and 3102[1] is not in effect at the time of the accident. P.A.1956, No. 218, § 3177, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

1. Sections 500.3101, 500.3102.

§ 500.3179 APPLICABILITY

Sec. 3179. This act applies to motor vehicle accidents occurring on or after October 1, 1973. P.A.1956, No. 218, § 3179, added by P.A.1972, No. 294, § 1, Eff. Oct. 1, 1973.

CHAPTER 32

CANCELLATION OF AUTOMOBILE LIABILITY POLICIES

Sec.

500.3204 Requisites; refusal to renew policy as cancellation.
500.3206 Policy of automobile insurance, defined.
500.3208 Termination of coverage at end of policy period.
500.3212 Nonpayment of premiums.
500.3220 Grounds for cancellation.
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500.3250 Statements in notice of cancellation; liability.
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§ 500.3204 REQUISITES; REFUSAL TO RENEW POLICY AS CANCELLATION

Sec. 3204. (1) No insurer shall cancel a policy of automobile liability insurance issued after November 1, 1966, in pursuance of their certificate of authority by the department unless the cancellation is effected pursuant to the applicable provisions of this chapter.

(2) Refusal to renew any policy of automobile liability insurance shall not constitute a cancellation unless the insurer fails to mail, 20 days prior to the termination date of the policy, by first class mail, a notice to the insured that the policy will not be renewed. P.A.1956, No. 218, § 3204, added by P.A. 1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 50.3206 POLICY OF AUTOMOBILE INSURANCE, DEFINED

Sec. 3206. As used in this chapter, "policy of automobile insurance" means a policy insuring private passenger automobiles, including those used in a car pool, or that portion of a combination policy which insures private passenger automobiles. P.A.1956, No. 218, § 3206, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3208 TERMINATION OF COVERAGE AT END OF POLICY PERIOD

Sec. 3208. This chapter shall not be applicable with respect to termination of coverage at the end of any policy period or at any annual anniversary date of any policy which specifies no term, nor shall it be applicable with respect to any cancellation for failure of the named insured to discharge when due any of his obligations in connection with the payment of premiums for the policy, or any installment thereof, whether payable directly to the insurer or his agent indirectly under any premium finance plan. P.A.1956, No. 218, § 3208, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3212 NONPAYMENT OF PREMIUMS

Sec. 3212. The provisions of this chapter are not applicable to cancellations occasioned by nonpayment of premiums and no hearings on appeals or other statutory provisions within this chapter are to be binding on any policy of insurance coverage that lapses due to nonpayment of premium. P.A.1956, No. 218, § 3212, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3220 GROUNDS FOR CANCELLATION

Sec. 3220. Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons:

(a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.

(b) That the named insured or any other operator, either resident of the same household or who customarily operates an automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final. P.A. 1956, No. 218, § 3220, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966; P.A.1970, No. 161, § 1, Imd. Eff. Aug. 2, 1970.

§ 500.3224 DENIAL OF COVERAGE; NOTICE OF CANCELLATION

Sec. 3224. (1) The cancellation of a policy of insurance within the 55-day period enumerated in subdivision (a) of section 3220 shall not be subject to appeal by the insured. Failure to disclose the cancellation by any insured upon any application for insurance shall not be grounds to deny coverage on the basis

of fraud by an insurer who may have accepted the risk thereafter.

(2) For the provisions of this chapter only, no cancellation shall be effective unless a written notice of cancellation is mailed by certified mail, return receipt requested, to the insured at the last address known to the insurer either through its records, the personal records of the agent who wrote the policy, or as supplied by the insured.

(3) The notice shall be mailed at least 20 days prior to the effective date of cancellation. For the purpose of this chapter only, delivery of such written notice by the insurer shall be the equivalent of mailing. The notice shall contain the reasons for the cancellation and shall state in bold type that the insured has the statutory right within 7 days from the date of mailing to appeal to the department. The commissioner shall approve the form of the cancellation notice. P.A.1956, No. 218, § 3224, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3230 VALIDITY OF CANCELLATION; REQUEST FOR HEARING

Sec. 3230. Any insured who wishes to contest the grounds of cancellation, within 7 days after the date of postmark indicating mailing of the notice of cancellation, which date shall be impressed upon the notice, shall file a written request for hearing directed to the department and shall pay a filing fee of $15.00 to defray the cost engendered by the hearing. P.A. 1956, No. 218, § 3230, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3234 SAME; HEARING BY COMMISSIONER; NOTICE

Sec. 3234. Within 10 days after receiving the notice of appeal from the insured, the commissioner or his officially appointed designees shall hold a hearing to determine the validity of the cancellation. The notice of the hearing shall be mailed

to the insured and the insurer at least 4 days prior to the date of the hearing. Each insurer licensed to do business in this state shall file with the commissioner, immediately upon the effective date of this chapter, a statement containing the name and address of the person authorized to receive such notice on behalf of the insurer. P.A.1956, No. 218, § 3234, added by P.A. 1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3240 Same; conduct of hearing; determination

Sec. 3240. At the hearing both parties shall have an opportunity to be heard and to be represented by counsel of their own choosing if they desire. The commissioner or his duly designated representative shall make his determination in writing stating his disposition of the matter. P.A.1956, No. 218, § 3240, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3244 Same; order for reinstatement or upholding cancellation; stay of cancellation; appeal

Sec. 3244. The commissioner or his designated representative shall either order the policy reinstated or he may uphold the cancellation. The commissioner may stay the cancellation of the policy pending his determination in writing stating his disposition of the matter. Any person who considers himself aggrieved by any final determination of the commissioner or his designated representative may appeal such decision to the circuit court under the terms and provisions of Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948. P.A.1956, No. 218, § 3244, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3250 Statements in notice of cancellation; liability

Sec. 3250. There shall be no liability on the part of, and no cause of action of any nature shall arise against, any insurer

or authorized representative, or its agents or employees, or the commissioner or his authorized representative for any statements made by them in any written notice of cancellation or at the time of the hearings conducted in connection therewith or in the findings required by the provisions of this chapter. P.A.1956, No. 218, § 3250, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3254 Filing fee; return to prevailing insured; disposition of funds

Sec. 3254. If the insured prevails in his appeal, the filing fee paid by the insured shall be returned to him by the insurer. All moneys collected under the provisions of this act shall be deposited to the credit of the general fund of the state. P.A. 1956, No. 218, § 3254, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3260 Rules and Regulations

Sec. 3260. The commissioner may make rules and regulations necessary for administration of this chapter. The rules shall be promulgated in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended. P.A.1956, No. 218, § 3260, added by P.A.1966, No. 342, § 1, Eff. Nov. 1, 1966.

§ 500.3262 Peace officers' private automobiles, cancellation of insurance

Sec. 3262. No insurer shall cancel, or refuse to renew a policy of insurance of any peace officer or fireman on his private automobile due to accident rate statistics compiled by the peace officer or fireman while driving police vehicles or fire department

vehicles in the pursuit of his duties as a peace officer or fireman. P.A.1956, No. 218, § 3262, added by P.A.1967, No. 202, § 1, Eff. Aug. 1, 1967, as amended P.A.1968, No. 95, § 1, Imd. Eff. June 4, 1968.

CHAPTER 33

AUTOMOBILE INSURANCE PLACEMENT FACILITY

Sec.

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500.3303 Definitions.

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§ 500.3301 PARTICIPATION IN FACILITY, REQUIREMENT, PURPOSE

Sec. 3301. (1) Every insurer authorized to write and writing automobile bodily injury liability and property damage liability insurance in this state shall participate in an organization for the purpose of:

(a) Providing the guarantee that automobile insurance coverage will be available to any person who is unable to procure such insurance through ordinary methods.

(b) Preserving to the public the benefits of price competition by encouraging maximum use of the normal private insurance system.

(2) The organization created under this chapter shall be called the "Michigan automobile insurance placement facility". P.A.1956, No. 218, § 3301, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3303 Definitions

Sec. 3303. As used in this chapter:

(a) "Qualified applicant" means a person who meets all of the following:

(i) Is a resident of the state.

(ii) Owns a motor vehicle registered in accordance with the laws of this state or who has a valid driver's license or who is required to file proof of financial responsibility with the secretary of state in accordance with the terms and conditions of section 520 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.520 of the Compiled Laws of 1948.

(iii) Has no unpaid premiums with respect to prior automobile insurance.

(b) "Facility" means the automobile insurance placement facility created pursuant to the provisions of this chapter.

(c) "Partcipating [sic] member" means an insurer who is required by the provisions of this chapter to be a member of the facility and who in any given calendar year has a participation ratio greater than zero in the facility for that year.

(d) "Participation ratio" means the ratio of the participating member's Michigan premiums or exposure units to the comparable statewide totals for all participating members.

(i) For private passenger nonfleet automobile insurance the ratio shall be based on voluntary net direct bodily injury liability car years written in the state for the calendar year ending December 31 of the second prior year as reported to the statistical agent of each participating member as private passenger nonfleet exposures.

(ii) For all other automobile insurance, including insurance for fleets, commercial vehicles, public vehicles and garages, the ratio shall be based on the total Michigan automobile liability gross direct premiums written including policy and membership fees, less return premiums and premiums on policies not taken, without including reinsurance assumed and without deducting reinsurance ceded, reduced by the amount of such premiums reported as private passenger nonfleet for the calendar year ending December 31 of the second prior year.

(iii) For expenses, assessments and voting rights, the ratio shall be based on the total Michigan automobile liability gross direct premiums written, including policy and membership fees, less return premiums and premiums on policies not taken, without including reinsurance assumed and without deducting reinsurance ceded for the calendar year ending December 31 of the second prior year.

(e) "Private passenger nonfleet automobile" means motorized vehicles designed for transporting passengers or goods, subject to specific contemporary definitions for insurance purposes as provided in the plan of operation. P.A.1956, No. 218, § 3303, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970, as amended P.A. 1971, No. 210, Eff. Dec. 29, 1971.

§ 500.3310 FACILITY COMMITTEE; MEMBERSHIP, ELECTION, QUALIFICATIONS; PLAN OF OPERATION, PROMULGATION, AMENDMENTS, EFFECT; BOARD OF GOVERNORS; ELECTION, TERM, VACANCIES

Sec. 3310. (1) Within 15 days after the effective date of this chapter the commissioner shall mail a ballot, returnable within 15 days from the date of mailing, to every participating member for the election of a 7-member facility committee. Ballots shall be tabulated by the commissioner on a weighted basis in the same ratio as provided for determining the participation ratio. Votes on a ballot may be divided among not more than 3 candidates. At least 3 members of the facility committee shall be elected from among representatives of domestic insurers.

(2) The facility committee shall become the initial board of governors of the facility effective with the adoption and approval of the plan of operation. Thereafter the board of governors of the facility shall be elected to serve annnual terms commencing within 45 days after the annual determination of participation ratios. Vacancies shall be filled as provided for in the plan of operation.

(3) The facility committee shall adopt a plan of operation by majority vote of the committee and shall submit it to the commissioner for his approval. If the commissioner finds that the plan meets the requirements of this chapter he shall approve it. If he finds that the plan fails to meet the requirements of this chapter he shall state wherein the plan is deficient and afford the facility committee 10 days within which to correct the deficiency. If the commissioner and the facility committee fail to agree that the provisions of the plan so submitted meet the requirements of this chapter, either party to the controversy may submit the issue to the circuit court of Ingham county for a determination. If the commissioner fails to render a written decision on the plan of operation within 30 days after receipt thereof, such plan shall be deemed approved.

(4) If the facility committee fails to submit a plan of operation within 120 days after the effective date of this chapter the commissioner shall prepare and promulgate a plan of operation in accordance with the requirements of this chapter, which shall continue in force until superseded by a plan of operation made effective in accordance with the provisions of this section, excepting the time limitations thereof.

(5) Amendments to the plan of operation shall be subject to majority approval by the board of governors and ratified by majority of the membership vote. Such membership vote shall be determined as defined in section 3303. Said amendments shall be subject to the approval of the commissioner, as provided in section 3310(3).

(6) Every insurer authorized to write and writing automobile bodily injury liability and property damage liability insurance in this state shall adhere to the plan of operation. P.A.1956, No. 218, § 3310, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3320 PRIVATE PASSENGER NONFLEET AUTOMOBILES, DISTRIBUTION OF APPLICANTS, COVERAGES

Sec. 3320. (1) The facility, with respect to private passenger nonfleet automobiles, shall provide for:

(a) The equitable distribution of applicants to participating members in accordance with the participation ratio defined in section 3303.

(b) Issuance of policies of insurance by participating members affording:

(i) Bodily injury liability and property damage liability coverage in minimum amounts specified in section 3009 and uninsured motorists coverage as required by section 3010 unless rejected in writing by the applicant; and

(ii) At the option of the insured, the following:

(a) A reasonable selection of additional limits of liability, and

(b) Excess medical payments coverage with a reasonable selection of limits, and

(c) Automobile physical damage coverage, including loss by collision, as required by section 3037.

(2) No coverage made available under paragraph (ii) shall be available to an applicant unless coverage provided for in paragraph (i) of subdivision (b) of subsection (1) shall also be provided; and coverage made available under this section shall be equivalent to the basic automobile liability and physical damage policy form as approved by the commissioner with such changes, additions and amendments as are adopted by the board of governors and approved by the commissioner. P.A.1956, No. 218, § 3320, added by P.A.1969, No. 346, § 1; P.A.1971, No. 210; P.A.1976, No. 303, § 1.

§ 500.3321 Automobiles other than private passenger non-fleet automobiles, coverages

Sec. 3321. The facility shall provide, with respect to all automobiles not included in section 3320:[1]

(a) Only the insurance required by law or required by the commissioner of insurance. The commissioner may only require insurance for which a rate has been filed by an insurance rating organization or insurer and which rate is in effect and which the commissioner finds, after a public hearing, to be reasonable, necessary, and in the public interest. The temporary provision of insurance may be required pending the public hearing if the commissioner determines it necessary to do so.

(b) The equitable distribution of applicants to participating members in accordance with the participation ratios defined in section 3303.[2] P.A.1956, No. 218, § 3321, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970. Amended by P.A.1977, No. 53, § 1, Imd. Eff. July 5.

1. Section 500.3320.
2. Section 500.3303.

§ 500.3330 Operation of facility, powers of board of governors

Sec. 3330. The board of governors shall have all power to direct the operation of the facility, including but not limited to the following:

(a) To sue and be sued in the name of the facility. No judgment against the facility shall create any liabilities in the individual participating members thereof.

(b) To delegate ministerial duties, to hire a manager and to contract for goods and services from others.

(c) To access* participating members of the basis of participation ratios to cover anticipated costs of operation and administration of the facility.

(d) To impose limitations on cancellation or nonrenewal by participating members of facility-placed business, in addition to the limitations imposed by chapter 32. P.A. 1956, No. 218, § 3330, added by P.A.1969, No. 346, § 1.

* So in original.

§ 50.3340 Classification and rules and rates manuals and rating plans, filing, modifications, approval; rates

Sec. 3340. (1) As agent for participating members, the facility shall file with the commissioner every manual of classification, every manual of rules and rates, every rating plan and every modification of any of the foregoing proposed for use for private passenger nonfleet automobile insurance placed through the facility. The facility may incorporate by reference in its filings other material on file with the commissioner. The classifications, rules and rates and any amendments thereof shall be subject to prior written approval by the commissioner. Rates filed by the facility shall not be excessive, inadequate, or unfairly discriminatory.

(2) Every participating member shall be authorized to use the rates and rules approved by the commissioner for use by the facility on business placed through the facility and shall use no other rates on private passenger nonfleet automobiles placed through the facility.

(3) Laws relating to rating organizations or advisory organizations shall not apply to functions provided for under this section. P.A.1956, No. 218, § 3340, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3350 Premium payment plans; exclusions as to unlicensed operators; public relations; annual financial statements; reinsurance

Sec. 3350. The facility shall provide:

(a) Optional deferred premium payment plan or plans which shall include sufficient advance payment at least equal to the pro rata earned premium at all times and shall include additional charges for such deferred payments.

(b) That policies issued on facility placed business may be indorsed to exclude coverage for any named person who is operating a motor vehicle after his driver's license has been refused, revoked or suspended by governmental authority.

(c) For publicizing and developing public understanding of the facility.

(d) For the rendering of an annual financial statement to all participating members and the commissioner.

(e) For the reinsurance of facility placed risks including, if desired, a pool for reinsuring liability coverages with limits in excess of those required by statute, or such other underwriting arrangements as may be necessary to enable participating members to offer said limits of liability insurance. P.A.1956, No. 218, § 3350, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3355 Placing coverage through facility, procedure; agents' commissions

Sec. 3355. Every agent who is authorized to solicit, negotiate or effect automobile insurance on behalf of any participating member shall:

(a) Offer to place coverage through the facility for any qualified applicant who is ineligible or unacceptable for coverage in the insurer or insurers for whom the agent is authorized to solicit, negotiate or effect automobile insurance.

(b) If the qualified applicant accepts the offer in subdivision (a), forward the application and any deposit premium required in accordance with the plan of operation, rules and procedures of the facility.

(c) Be entitled to receive, and any participating member be entitled to pay, a commission for placing insurance

through the facility at the uniform rates of commission as provided in the plan of operation. P.A.1956, No. 218, § 3355, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3360 Agents' loss ratios

Sec. 3360. A participating member may not include the premiums and losses incurred from risks insured through the facility in determining the loss ratio of any of its agents, or otherwise use the experience from such risks as cause for altering the relationship between the participating member and its agent. P.A.1956, No. 218, § 3360, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3365 Eligibility for placement of coverage through facility, determination

Sec. 3365. (1) Any qualified applicant who has been rejected, cancelled or refused renewal with respect to automobile liability insurance by a participating member shall be eligible for insurance as provided by this chapter through the facility.

(2) Eligibility for placement through the facility will terminate if an insured is offered equivalent coverage in the voluntary market at a rate lower than the facility rate. If the participating member that is required to provide coverage by the facility makes such an offer after giving 30 days' advance written notice to the agent of record before making the offer, the participating member shall have no further obligation to the agent of record.

(3) Every participating member at least annually shall review every applicant which it insures through the facility and determine whether or not such applicant is acceptable for voluntary insurance at a rate lower than the facility rate. If such applicant

is acceptable, the participating member shall make an offer as defined in subsection (2). P.A.1956, No. 218, § 3365, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3370 Assistance to applicants seeking placement of coverage

Sec. 3370. If the commissioner shall find, after hearing, that a large number of persons are failing to gain the benefits of the facility, the facility shall provide service to assist the public in making application to the facility for placement. P.A. 1956, No. 218, § 3370, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

§ 500.3380 Violations of plan of operation or improper act of facility, hearings, review

Sec. 3380. (1) Any participating member, applicant or person insured under a policy placed through the facility may request a formal hearing and ruling by the board of governors of the facility on any alleged violation of the plan of operation or any alleged improper act or ruling of the facility directly effecting its assessment, premium or coverage furnished. But such right to hearing shall not apply to any claim arising out of insurance provided by any participating member. Such request for hearing must be filed within 30 days after the date of the alleged act or decision.

(2) The plan of operation shall provide for prompt and fair hearings.

(3) Any formal ruling by the board of governors may be appealed to the commissioner by filing notice of appeal with the facility and commissioner within 30 days after issuance of the ruling.

(4) The commissioner shall issue an order approving the action or decision, disapproving the action or decision, or directing the board of governors to reconsider the ruling. P.A.1956, No. 218, § 3380, added by P.A.1969, No. 346, § 1, Eff. April 1, 1970.

APPENDIX I.

Introduction

This appendix is a chart showing the relevant provisions of the insurance statutes of the forty-nine states other than Michigan, and the insurance regulations of the District of Columbia. Entries in the first three columns show three types of compulsory insurance provisions: 1) no fault; 2) third party liability; and 3) financial responsibility. The absence of a statutory citation for a particular state in any of these three columns indicates that no such insurance is made compulsory by that state.

The latter four columns show provisions for hearings where insureds are affected by rating decisions, cancellation, nonrenewal or refusal to insure. A column marked by an asterisk (*) shows those hearing provisions where an insurer is given the opportunity to provide a hearing before an insured may petition to the state regulatory body. The absence of a statutory citation in the latter four columns indicates that no hearing is required.

CHART SUMMARIZING RELEVANT INSURANCE PROVISIONS OF THE VARIOUS STATES

State	Compulsory No-Fault	Compulsory Liability	Compulsory Financial Responsibility†	Hearings			
				Rate Regulation	Cancellation	Non-Renewal	Refusal
Alabama			Ala. Code § 32-7-1	Ala. Code § 27-13-71*			
Alaska			Alaska Stat. § 28.20.010	Alaska Stat. § 21.39.090*	Alaska Stat. § 21.36.320	Alaska Stat. § 21.36.320	
Arizona			Ariz. Rev. Stat. Ann. § 28-1101	Ariz. Rev. Stat. Ann. § 20-367*	Ariz. Rev. Stat. Ann. § 20-1633	Ariz. Rev. Stat. Ann. § 20-1633	
Arkansas			Ark. Stat. Ann. § 75-1401	Ark. Stat. Ann. § 66-3126(2)*			
California		Cal. Vehicle Code § 16020	Cal. Vehicle Code § 16000	Cal. Ins. Code § 1858*			
Colorado	Colo. Rev. Stat. § 10-4-701 et seq.	Colo. Rev. Stat. § 10-4-705, 706	Colo. Rev. Stat. Ann. § 42-7-101	Colo. Rev. Stat. Ann. § 10-4-403*	Colo. Rev. Stat. Ann. § 10-4-720	Colo. Rev. Stat. Ann. § 10-4-720	
Connecticut	Conn. Gen. Stat. Rev. § 38-319	Conn. Gen. Stat. Rev. § 38-327	Conn. Gen. Stat. Rev. § 14-112	Conn. Gen. Stat. Rev. § 38-201p*			
Delaware	Del. Code Ann. tit. 21, § 2118	Del. Code Ann. tit. 21, § 2118		Del. Code Ann. tit. 18, § 2520	Del. Code Ann. tit. 18, § 3906	Del. Code Ann. tit. 18, § 3906	
District of Columbia			D.C. Code § 40-417	D.C. Code § 35-1507*	Ins. Regs. § 1160.7	Ins. Regs. § 1160.7	
Florida	Fla. Stat. § 627.730		Fla. Stat. § 324.011	Fla. Stat. § 627.371*	Fla. Stat. § 627.728		
Georgia	Ga. Code Ann. § 56-3401(b)	Ga. Code Ann. § 56-3403(b)	Ga. Code Ann. § 68C-101	Ga. Code Ann. § 56-527*			
Hawaii	Hawaii Rev. Stat. § 294-8	Hawaii Rev. Stat. § 294-10	Hawaii Rev. Stat. § 287-1	Hawaii Rev. Stat. § 294-13(e)			
Idaho		Idaho Code § 49-233	Idaho Code § 49-1501	Idaho Code § 41-1423*			
Illinois			Ill. Rev. Stat. ch 95½, § 7-100		Ill. Rev. Stat. ch 73, § 755.23	Ill. Rev. Stat. ch 73, § 755.23	
Indiana			Ind. Stat. Ann. § 9-2-1-1	Ind. Stat. Ann. § 27-1-22-5	Ind. Stat. Ann. § 27-7-6-11		

State	Compulsory No-Fault	Compulsory Liability	Compulsory Financial Responsibility†	Hearings			
				Rate Regulation	Cancellation	Non-Renewal	Refusal
Iowa			Iowa Code § 321A.1	Iowa Code § 515A.9*	Iowa Code § 515D.10	Iowa Code § 515D.10	
Kansas	Kan. Stat. Ann. § 40-3101	Kan. Stat. Ann. § 40-3104		Kan. Stat. Ann. § 40-1117*	Kan. Stat. Ann. § 40-3118(d)		
Kentucky	Ky. Rev. Stat. Ann. § 304.39-010	Ky. Rev. Stat. Ann. § 304.39-080		Ky. Rev. Stat. Ann. § 304.13-230(2)*			
Louisiana		La. Rev. Stat. § 32:861	La. Rev. Stat. § 32:851	La. Rev. Stat. § 22:1412*			
Maine			Me. Rev. Stat. Ann. tit. 29, § 781	Me. Rev. Stat. Ann. tit. 24-A, § 2320*	Me. Rev. Stat. Ann. tit. 24A § 2911	Me. Rev. Stat. Ann. tit. 24A § 2911	
Maryland	Md. Code Ann. art 48A, § 538 et seq.	Md. Code Ann. art 17-104		Md. Code Ann. art 48A § 242(k)*	Md. Code Ann. art 48A § 234C	Md. Code Ann. art 48A § 234C	Md. Code Ann. art 48A § 234C
Massachusetts	Mass. Ann. Laws ch 90 § 34M	Mass. Ann. Laws ch 90 § 1A		Mass. Ann. Laws ch 175A § 11*	Mass. Ann. Laws ch 175, § 22C	Mass. Ann. Laws ch 175, § 22H	Mass. Ann. Laws ch 175, § 22H
Minnesota	Minn. Stat. § 65B.41	Minn. Stat. § 65B.48		Minn. Stat. § 70A.19*			
Mississippi			Miss. Code Ann. § 63-15-1	Miss. Code Ann. § 83-3-123	Miss. Code Ann. § 83-11-17	Miss. Code Ann. § 83-11-17	
Missouri			Mo. Ann. Stat. § 303.010	Mo. Ann. Stat. § 379.348*			
Montana			Mont. Rev. Codes Ann. § 53-418	Mont. Rev. Codes Ann. § 40-3659*			
Nebraska			Neb. Rev. Stat. § 60-501	Neb. Rev. Stat. § 44-1424*			
Nevada	Nev. Rev. Stat. § 698.250	Nev. Rev. Stat. § 698.190	Nev. Rev. Stat. § 485.010				
New Hampshire			N.H. Rev. Stat. Ann. § 268:1	N.H. Rev. Stat. Ann. § 414:7*	N.H. Rev. Stat. Ann. § 417-A:7	N.H. Rev. Stat. Ann. § 417-A:7	N.H. Rev. Stat. Ann. § 417-A:7
New Jersey	N.J. Stat. Ann. § 39.6A-4	N.J. Stat. Ann. § 39:6A-3	N.J. Stat. Ann. 39:6-23	N.J. Stat. Ann. § 17:29A-9*			
New Mexico			N.M. Stat. Ann. § 64-24-42	N.M. Stat. Ann. § 58-10-10*			

State	Compulsory No-Fault	Compulsory Liability	Compulsory Financial Responsibility†	Hearings			
				Rate Regulation	Cancellation	Non-Renewal	Refusal
New York	N.Y. Ins. Law § 670	N.Y. Veh. & Traf. Law § 312		N.Y. Ins. Law § 186			
North Carolina		N.C. Gen. Stat. § 20-309		N.C. Gen. Stat. § 58-131.53*	N.C. Gen. Stat. § 20-310	N.C. Gen. Stat. § 20-310	
North Dakota	N.D. Cent. Code Ann. § 26-41-01	N.D. Cent. Code Ann. § 26-41-04	N.D. Cent. Code Ann. § 39-16-01	N.D. Cent. Code Ann. § 26-18-10*			
Ohio			Ohio Rev. Code Ann. § 4509.01	Ohio Rev. Code Ann. § 3937.08*	Ohio Rev. Code Ann. § 3937.35		
Oklahoma		Okla. Stat. tit. 47, § 7-601	Okla. Stat. tit. 47, § 7-301	Okla. Stat. tit. 36, § 904*			
Oregon	Ore. Rev. Stat. § 743.800	Ore. Rev. Stat. § 486.011 et seq.	Ore. Rev. Stat. § 486.011	Ore. Rev. Stat. § 737.340(1)			
Pennsylvania	Pa. Stat. Ann. tit. 40 § 1009.101	Pa. Stat. Ann. tit. 40 § 1009.104	Pa. Stat. Ann. tit. 75, § 1701	Pa. Stat. Ann. tit. 40, § 1229*	Pa. Stat. Ann. tit. 40 § 1008.5	Pa. Stat. Ann. tit. 40 § 1008.5	
Rhode Island			R.I. Gen. Laws Ann. § 31-32-1	R.I. Gen. Laws Ann. § 27-9-29*			
South Carolina		S.C. Code § 56-11-720	S.C. Code § 56-9-10	S.C. Code § 38-43-760*	S.C. Code § 38-37-1470	S.C. Code § 38-37-1470	S.C. Code § 38-37-1470
South Dakota			S.D. Codified Ann. § 32-35-1	S.D. Codified Ann. § 58-24-29*			
Tennessee			Tenn. Code Ann. § 59-1251	Tenn. Code Ann. § 56-612*			
Texas			Tex. Stat. Ann. art 6701(h)	Tex. Stat. Ann. Insurance Code art 5.18*			
Utah	Utah Code Ann. § 31-41-1	Utah Code Ann. § 31-41-4	Utah Code Ann. § 41-12-1	Utah Code Ann. § 31-18-20(3)(b)*			
Vermont			Vt. Stat. Ann. tit. 23, § 801	Vt. Stat. Ann. tit. 8, § 4660*			
Virginia			Va. Code Ann. § 46.1-388	Va. Code Ann. § 38.1-279.51*	Va. Code Ann. § 38.1-381.5	Va. Code Ann. § 38.1-381.5	
Washington			Wash. Rev. Code § 46.29.010	Wash. Rev. Code § 48.19.310*			

State	Compulsory No-Fault	Compulsory Liability	Compulsory Financial Responsibility†	Hearings			
				Rate Regulation	Cancellation	Non-Renewal	Refusal
West Virginia			W. Va. Code Ann. § 17D-3-1	W. Va. Code Ann. § 33-20-9*	W. Va. Code Ann. § 33-6A-5	W. Va. Code Ann. § 33-6A-5	
Wisconsin			Wis. Stat. Ann. § 344.01	Wis. Stat. Ann. § 204.45(2)*			
Wyoming			Wyo. Stat. Ann. § 31-9-101	Wyo. Stat. Ann § 26-14-126*			

* Specifies those statutes in which an insurer which makes its own rates (or rating organization) is authorized to hear a complaint. If the insurer refuses to hear the complaint, or hears it but denies the requested relief, the insured may petition to the state regulatory agency.

† Specifies the first section of that portion of a statute regarding financial responsibility for the future.

Supreme Court, U. S.
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MAY 14 1979
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1583

ALLSTATE INSURANCE COMPANY, an Illinois Corporation,

Petitioner,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, LEAGUE GENERAL INSURANCE COMPANY, et al.,

Respondents.

BRIEF OF RESPONDENT LEAGUE GENERAL INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES BY ALLSTATE INSURANCE COMPANY

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ARGUMENT

THE MICHIGAN SUPREME COURT DECIDED THIS QUESTION ON STATE CONSTITUTIONAL GROUNDS; THEREFORE, THERE IS NO ISSUE BEFORE THIS COURT.

The case law is well settled that if a state court decides an issue on state constitutional questions, that case cannot be reviewed by the United States Supreme Court, even though there may also be federal questions involved.

We do not attempt to settle the dispute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri,* 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time. It is enough to cite, in addition to the *Klinger* case, the following: *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 163-165; *Petrie* v. *Nampa Irrigation District,* 248 U. S. 154, 157; *McCoy* v. *Shaw,* 227 U. S. 302; *Eustis* v. *Bolles,* 150 U. S. 361.

—*Fox Film Corp.* v. *Miller,*
296 U. S. 207, 209-210 (1935)

See also the 1874 landmark case of *Murdock* v. *City of Memphis,* 20 Wallace 590 (1874).

The United States Supreme Court has also held that in case of an ambiguity as to whether a state court decided an issue on the state constitutional question or on a federal constitutional question, the judgment of the state court can be vacated and remanded to that court for further proceedings and clarification.

It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution

of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be revoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

For these reasons we vacate the judgment of the Supreme Court of Minnesota and remand the cause to that court for further proceedings.

Judgment vacated.

—*Minnesota* v. *National Tea Co.,*
309 U. S. 551, 557 (1940)

A. THE MICHIGAN STATE SUPREME COURT DECIDED THE DUE PROCESS QUESTION RAISED BY PETITIONERS ON THE MICHIGAN STATE CONSTITUTIONAL PROVISION FOR DUE PROCESS.

The Michigan state constitutional provision for due process is as follows:

> Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.
>
> —Const. 1963, art. 1, § 17.

In the *Shavers* case, the Michigan Court raised, ***sua sponte,*** the following question:

> We perceive the issue of the constitutionality of the "compulsory insurance requirement" of § 3101(1) to be, in essence, two-fold:
>
> • • •
>
> (B) Does the present regulatory scheme for compulsory no-fault insurance sufficiently protect the interests of registrants and operators of motor vehicles in accord with the due process clause of the Michigan and United States Constitutions as to
>
> (1) the fairness of insurance rates, and
>
> (2) the proper availability of insurance.
>
> —*Shavers* v. *Attorney General,* 402 Mich. 554, 594-595 (1978)

The Michigan Court then proceeded to answer question (B) as follows:

> In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates. Consequently due process protections under the *Michigan* and United States Constitutions (Const 1963, art 1, § 17; US Const, Am XIV) are operative.
>
> The Legislature has, additionally, fostered the expectation that no-fault insurance will be available at fair and equitable rates. Section 2403(1)(d) of the Insurance Code states that "Rates shall not be excessive, inadequate or unfairly discriminatory", MCL 500.2403(1)(d); MSA 24.12403(1)(d); § 3301(1)(a) of the Insurance Code provides the "guarantee" that no-fault insurance coverage "will be available to any person who is unable to procure such insurance through ordinary methods". MCL 500.3301(1)(a); MSA 24.13301(1)(a).[23]
>
> We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis. The availability of no-fault insurance and the no-fault insurance rate regu-

---

[23]

This is a separate and independent basis for invoking due process protection for Michigan motorists required to purchase no-fault insurance. See *Viculin* v *Dep't of Civil Service,* 386 Mich 375, 387; 192 NW2d 449 (1971); see, also, *Paul* v *Davis,* 424 US 693, 710-711; 96 S Ct 1155; 47 L Ed 2d 405 (1976); *Bishop* v *Wood,* 426 US 341; 96 S Ct 2074; 48 L Ed 2d 684 (1976); *Meachum* v *Fano,* 427 US 215, 226; 96 S Ct 2532; 49 L Ed 2d 451 (1976); *The Supreme Court, 1975 Term,* 90 Harv L Rev 86-104 (1976).

latory scheme are, accordingly, subject to due process scrutiny.[24]

—*Shavers, supra,* 599-600
Emphasis added.

Thus, the Michigan Supreme Court decided the question of the fairness of insurance rates and the proper availability of insurance based on the due process provisions of ***both*** the United States Constitution and the Michigan Constitution. It is essential to recognize that in the following sentence the Michigan Supreme Court used the word *"and"* in the ***disjunctive*** and not the ***conjunctive*** sense:

> Consequently due process protections under the Michigan *and* United States Constitutions (Const 1963, art 1, §17; US Const, Am XIV) are operative.
>
> —*Shavers, supra,* 599.
> Emphasis added.

Thus, it is clear that the Michigan Supreme Court said that the due process protections of the United States Constitution are available and also of the Michigan Constitution.

---

[24]

We note that at least two courts have held that consumers have an insufficient interest to invoke due process with respect to utility rates. ***Holt*** v ***Yonce,*** 370 F Supp 374 (D SC, 1973); ***Sellers*** v ***Iowa Power & Light Co,*** 372 F Supp 1169 (SD Iowa, 1974). We believe these cases are distinguishable from the instant challenge to the no-fault insurance rate-making scheme. First, insurance underwriting and rate-making, unlike utility rate-making, inherently involves discrimination among individuals. Insurance policies are written in accord with an insurance company's perception of an individual's risk. Serious equal protection issues are, thereby, implicated. Second, no history of careful rate-regulation exists with respect to the insurance industry. Lewis, Comment: ***Insurance Rate Regulation in Pennsylvania: Does the Consumer Have a Voice?,*** 81 Dickinson L Rev 297, 304-305 (1977).

THEREFORE, EVEN IF, *IN ARGUENDO,* THIS COURT HELD THAT THE UNITED STATES CONSTITUTIONAL DUE PROCESS PROVISIONS WERE NOT APPLICABLE, THE MICHIGAN COURT DECISION WOULD STILL STAND BECAUSE IT WAS EQUALLY BASED UPON THE MICHIGAN CONSTITUTION.

It should be noted that in the sentence quoted above, the Michigan Court placed the term "Michigan Constitution" before that of "United States Constitution."

Therefore, pursuant to *Fox Film Corp.* v *Muller,* quoted above, this Court has no jurisdiction in this matter since this case was decided on state constitutional grounds.

B. THE MICHIGAN STATE SUPREME COURT HAS THE AUTHORITY UNDER THE MICHIGAN CONSTITUTION TO DECIDE AN ISSUE *SUA SPONTE.*

The Michigan Supreme Court has this right to decide a question ***sua sponte.***

The very first section of the judicial branch article of the Michigan Constitution states as follows:

> Sec. 1. The judicial power of the state is vested exclusively in *one court of justice* which shall be divided into *one supreme court,* one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.
>
> —Const. 1963, art. 6, §1
> Emphasis added.

The Michigan Supreme Court, in exercising its rule-making power, has adopted the following rules which clearly give it the authority to make a *sua sponte* decision, if it decides such is required by the case:

> 1. Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers, in its discretion and on such terms as it deems just:
>
> (7) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief as the case may require;
>
> —GCR 1963, 865.1(7)

> Rules of practice set forth in any statute, not in conflict with any of these rules, shall be deemed to be in effect until superseded by rules adopted by the Supreme Court.
>
> —GCR 1963, 16

Thus, although petitioner may not like the results of a decision arrived at *sua sponte* any more than any other decision, that decision under the Michigan Constitution and the court rules adopted by the Michigan State Supreme Court, are just as binding and effective as any other court decision.

C. THE DECISION OF THE SUPREME COURT RELATIVE TO DUE PROCESS REGARDING INSURANCE RATES AND AVAILABILITY IS JUST AND EQUITABLE.

All the Michigan Court has done is say that if the state *mandates* that individuals have automobile insurance, the state must also assure there is due process in implementing the existing statutory provision that rates are such that they

not be "excessive, inadequate or unfairly discriminatory," (MCLA 500.2403(1) (d)); and further, this mandatory insurance coverage "will be available to any person who is unable to procure such insurance through ordinary methods," (MCLA 500.3301(1) (a)).

The Michigan Court in the *Shavers* case gave the legislature and insurance commissioner 18 months from the issuance of this opinion to meet the due process requirements. *Shavers, supra,* 609.

D. MICHIGAN'S NO-FAULT LAW IS UNIQUE AND THIS CASE DOES NOT HAVE APPLICABILITY TO OTHER STATES' NO-FAULT LAWS.

A reading of the Michigan no-fault law in comparison with those of other states shows that the Michigan law is unique —not only the no-fault law referred to, but also the other statutes relative to the Insurance Code.

E. THE REQUIREMENT THAT ALL DRIVERS PURCHASE AUTO INSURANCE *IS* STATE ACTION.

In its petition for Writ of Certiorari, Allstate Insurance has sought to suggest that the Supreme Court of Michigan failed to identify an action by the state which would call for the imposition of due process guaranteed. It is claimed that "the nexus between the state of Michigan and the activities of private, no-fault insurers is not sufficiently close to treat the insurers' actions as those of the state's." (See Petition for Writ of Certiorari, page 10).

This argument ignores the fact that the state action upon which the court relies is the passage of a law, i.e., the requirement of sec. 3101 of the No-Fault Act that all persons who own or operate a motor vehicle purchase no-fault in-

surance. Passage of a law is emphatically state action. There is simply no occasion for the detailed argument in which petitioner would have the court indulge over whether or not an insurance company's private activities constitute state action because the action on which the Court has focused is the enactment of a law which no entity but the state could perform. As the court itself states, "the no-fault act compels insurance for all motor vehicles. Failure to comply with this requirement may result in criminal and civil sanctions." (See Shavers Opinion, p. 597).

Arguments of the type envisioned by petitioner arise where it is asserted that a private entity's action in reality is that of the state. For example, when a public utility cuts off service, See: *Jackson* v *Metropolitan Edison Company*, 419 US 345 (1974). In such an instance arguments must be marshalled in an effort to overcome the private nature of the entity responsible for the actions complained of. In this instance, the action complained of is the requirement that citizens purchase no-fault insurance. The requirement is imposed by the state of Michigan acting directly through its power to impose criminal sanctions. Under these circumstances no "state action" question exists.

CONCLUSION

WHEREFORE, this Court is asked to deny the petition for a writ of certiorari because the Michigan State Supreme Court based its decision on the Michigan State Constitution, independent of the United States Constitution. Or, in the alternative, if there is any ambiguity in the mind of this Court as to whether the Michigan Court acted on the state or federal constitutional provisions of due process (which ambiguity respondent denies), this Court is asked to refer this matter back to the Michigan Supreme Court for clarification pursuant to *Minnesota* v *National Tea Co., supra.*

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-1583

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Petitioner,

v.

FRANK J. KELLEY, Attorney General
of the State of Michigan, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OF RESPONDENTS, FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, RICHARD H. AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN, JEAN CARLSON, ACTING COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, IN OPPOSITION

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OPINIONS BELOW

The opinions of the courts below are reproduced in Petitioner's Appendix.

JURISDICTION

Petitioner invokes jurisdiction under 28 USC § 1257(3), as a purported appeal from a final judgment of the highest court of the State of Michigan. Respondents, State Officers of the State of Michigan, dispute this claim of jurisdiction and assert that no final judgment of the Michigan Supreme Court has been rendered. Respondents, State Officers of the State of Michigan, further assert that jurisdiction fails because a non-federal independent and adequate ground supports the judgment of the Michigan Supreme Court.

QUESTIONS PRESENTED

Whether the issuance of the opinion by the Michigan Supreme Court constituted a final judgment of that Court as required by 28 USC § 1257(3) in order to confer jurisdiction upon this Court.

Whether Michigan's due process clause, set forth in Michigan Const 1963, art 1, § 17, constitutes an adequate ground, independent of the federal Due Process Clause set forth in the 14th Amendment to the United States Constitution, to support the judgment of the Michigan Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions referred to in the Petition this case involves Michigan Const 1963, art 1, § 17, which provides:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

This case also involves Michigan General Court Rule GCR 1963, 866.3(b):

> "Orders or Judgments Pursuant to Opinions.
>
> "• • •
>
> (b) Routine Issuance.
>
> (1) If a motion for rehearing is not timely filed under sub-rule 864.4(a), the clerk shall send a certified copy of the order or judgment to the Court of Appeals with its file and to the court or tribunal which tried the case with its record, no less than 20 or more than 30 days afters entry of the order or judgment.
>
> (2) If a motion for rehearing is timely filed, the clerk shall fulfill his responsibilities under paragraph (1) promptly after the Court denies the motion or, if the motion is granted, enter a new order or judgment after the Court's opinion on rehearing.

STATEMENT OF THE CASE

The Michigan Supreme Court's opinion that Michigan's no-fault automobile insurance law is unconstitutional is scheduled to take effect on December 8, 1979, 18 months after

the issuance of its opinion. *Shavers* v *Frank J. Kelley, Attorney General of the State of Michigan, et al,* 402 Mich at 608-609; 267 NW2d at 91-92 (1978), (App A31). The purpose of the delay in effectiveness is to allow the Legislature and the Insurance Commissioner sufficient time to correct the due process violations found in the no-fault automobile insurance law. The Michigan Supreme Court concluded that the no-fault insurance law would not satisfy constitutional due process unless the Legislature and/or the Commissioner of Insurance gives substantial meaning to the statutory standards "rates shall not be excessive, inadequate or unfairly discriminatory." Detailed minimum requirements to pass constitutional muster are set forth in the Michigan Supreme Court's opinion at page A3 of the Petitioner's Appendix. To date, as indicated by footnote 9 on Petitioner's brief, more than 10 months after the Michigan Supreme Court's mandate, no legislation nor administrative rules have been promulgated correcting the due process deficiencies of the no fault automobile insurance law. Admittedly, proposed amendments to the law and agency regulations are under consideration, as also indicated in footnote 9. Assuming that statutory amendments are enacted and regulations promulgated, the Michigan Supreme Court has retained jurisdiction and will re-examine the statutory amendments and regulations to determine whether they remedy the designated due process deficiencies.

ARGUMENT

I

THE OPINION OF THE MICHIGAN SUPREME COURT IS NOT A "FINAL JUDGMENT" UNDER 28 USC § 1257 FOR PURPOSES OF THIS COURT'S JURISDICTION, AND PETITIONER'S ALLEGATIONS OF HARM ARE PREMATURE.

This Court's review is limited by 28 USC § 1257 to "final judgments or decrees rendered by the highest court of a State." The opinion of the Michigan Supreme Court in the instant case is unequivocal: that Court did not issue a final judgment with regard to the constitutionality of Michigan's no fault automobile insurance law. Its initial opinion is that the compulsory insurance provisions of the statute deny due process of law but that opinion has not yet resulted in a final order or judgment under state law and therefore this Court is without jurisdiction to review that opinion. It is apparent that, as a matter of state law, the Michigan Supreme Court's opinion has not yet resulted in a final order or judgment, *Shavers, supra,* 402 Mich at 609-610, 638; App A31-A32, A60:

> "We therefore believe it best, for purposes of the general jurisprudence, the general welfare of the public, and the administration of justice in our state to hold the 'compulsory insurance requirement' of the No-Fault Act unconstitutional (for the reasons articulated *supra*) *effective as of 18 months from the issuance of this opinion.*
>
> "At an appropriate time before 18 months from the issuance of this opinion, we will re-examine the constitutional status of the No-Fault Act in terms of remedying the present due process deficiencies. Any party or

person wishing to file briefs or be heard shall make timely inquiry with the Clerk as to the procedure. This Court will take whatever action appears appropriate at that time.

"• • •

"An appropriate order reflecting the unconstitutional status of the No-Fault Act will enter 18 months from the issuance of this opinion. GCR 1963, 866.3(b)." (footnotes omitted, emphasis in original).

Michigan General Court Rule GCR 1963, 866.3 involves the issuance of orders or judgments pursuant to opinions and it is apparent that the final order or judgment—and not the opinion—determines finality under state law. *People* v *George*, 399 Mich 638, 250 NW2d 491 (1977). Respondents submit that the opinion of the Michigan Supreme Court is not a "final judgment" under 28 USC § 1257 because that opinion does not meet the test of finality stated in *Department of Banking* v *Pink*, 317 US 264, 268 (1942) that "the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."

The opinion of the Michigan Supreme Court is not a "final judgment" and it is apparent that Petitioner has not been harmed by that opinion. The Petitioner will not be harmed unless and until the Michigan Supreme Court determines, in future proceedings, that the Michigan No-Fault Automobile Insurance law as it might then exist after possible revision, is constitutional. If and when such revisions are made and the statute is declared constitutional, Petitioner will have ample opportunity to assert its constitutional challenges. Petitioner may become involved in the legislative proceedings affecting possible revision of the statute and even if subsequent amendments are made, Petitioner will still have opportunity in the state courts to challenge those provisions of the statute which it feels violate its constitutional rights. Even should Petitioner fail in subsequent state proceedings, it will nevertheless have opportunity in this court to file a petition for a writ of certiorari seeking review of any final order or judgment of the Michigan Supreme Court.

II

ASSUMING, ARGUENDO, THAT THE OPINION OF THE MICHIGAN SUPREME COURT IS A "FINAL JUDGMENT" REVIEWABLE IN THIS COURT, CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION RESTS UPON AN ADEQUATE INDEPENDENT BASIS IN STATE LAW.

A reading of the Michigan Supreme Court's opinion manifests that court's awareness of the Michigan Due Process Clause set forth in Michigan Const 1963, art 1, § 17. In that opinion, whenever discussing due process issues the Michigan Supreme Court carefully based its decision not only upon the Due Process Clause of the Fourteenth Amendment of the United States Constitution but also upon the Michigan constitutional provision. See 402 Mich at 590-591, 599; App A14, A22. Therefore, the Michigan Supreme Court has made it abundantly clear that its decision was based, in significant part, upon the determination that independent of federal constitutional considerations the Act violates the Due Process Clause of the Michigan constitution.

It has been a long-settled rule of this Court that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the jurisdiction of this Court fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corporation* v *Muller*, 296 US 207, at pp 209-210 (1935). It is manifest that the Michigan Supreme Court was very careful to make clear to all parties that it rested its decision upon the Michigan Constitutional Due Process Clause and upon the United States Constitutional Due Process Clause. At no time in referring to due process did the Michigan Supreme Court ever omit the Michigan Constitutional provision if it also referred to the federal due process provision. The Michigan due process provision can stand on its own and would meet the test of *Fox Film Corporation, supra.* Furthermore, in questions concerning whether state action should be interpreted under state constitutional provisions or federal constitutional provisions, this Court has established a policy of remanding questions to the state courts if it is ambiguous as to whether the adjudication by the state court was pursuant to the state constitution or the federal constitution. This court has stated that to do otherwise would encroach upon the constitutional jurisdiction of the states. *Minnesota* v *National Tea Co*, 309 US 551, at p 557 (1940). If a reading of the Michigan Supreme Court's opinion is not sufficiently convincing that the Michigan Supreme Court has unambiguously set forth an independent and adequate state basis for supporting its judgment, then it is appropriate that this matter be remanded to the Michigan Supreme Court for clarification.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner's application for writ of certiorari be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE AND BRIEF AS AMICI CURIAE BY THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND THE ALLIANCE OF AMERICAN INSURERS.

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Now Come the National Association of Independent Insurers and the Alliance of American Insurers, through their counsel of record, Thomas J. Weithers, and move this Court for leave to file the attached brief as *amici curiae* in this case. Counsel for the petitioner, and counsel for the respondents, State Farm Mutual, Aetna Casualty and Surety Company, The Travelers Indemnity Company, Hartford Accident & Indemnity

Company, Continental Casualty Company, the Home Insurance Company, Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company have consented to the filing of the attached brief. The consent of counsel for respondents Catherine Shavers, et al. (plaintiffs), Frank J. Kelley, Attorney General of the State of Michigan, Richard H. Austin, Secretary of State of Michigan, Daniel J. Demlow, Commissioner of Insurance of the State of Michigan and League General Insurance Company was requested, but refused.

The National Association of Independent Insurers and the Alliance of American Insurers are trade associations with a combined membership in excess of five hundred insurance companies. The interest of the National Association of Independent Insurers and the Alliance of American Insurers as *amici curiae*, which is set forth in more particularity at pages 1-3 of the attached brief, is in the effect of a potential misapplication of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States to insurers of many or most of the states other than the State of Michigan.

The opinion of the Supreme Court of Michigan in this case enunciates a novel proposition, never recognized by this Court, by any United States Court of Appeals, or by any other state supreme court. If the interpretation given to the Fourteenth Amendment by the Supreme Court of the State of Michigan is followed by the Courts of Appeals and the supreme courts of other states, the requirements of procedural due process will be directly imposed upon all insurers which provide any form of insurance required by state law.

The effect of such an imposition would be to create unnecessary and costly procedures ostensibly to protect insured persons whose interests are already protected by comprehensive statutory regulation by the individual states. The adverse impact upon the insurance industry and the insured public arising from an application of the decision of the Supreme Court of Michigan is set forth more fully in the attached brief.

The issue of the application of procedural due process under the Fourteenth Amendment to the Constitution of the United States to the purchase of automobile insurance has not been adequately heretofore presented by the parties. The issue was raised, *sua sponte*, by four of the justices of the Supreme Court of the state of Michigan after the filing of briefs and oral argument in that court (see dissenting opinion of Justices Ryan, Coleman and Fitzgerald.)

This issue, and its potential application to the purchase of insurance in other states, is both relevant and central to the disposition of this case.

Respectfully submitted,

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April 19, 1979

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Other Authorities.

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BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND THE ALLIANCE OF AMERICAN INSURERS AS AMICI CURIAE.

INTEREST OF AMICI CURIAE.

The National Association of Independent Insurers ("NAII") is a trade association of over four hundred insurance companies and the Alliance of American Insurers ("AAI") is a trade association of approximately one hundred insurance companies. The members of both associations write property and casualty insurance not only in the state of Michigan but in each of the

other forty-nine states. Many of the member companies write such insurance in all fifty states. Other members write insurance on a regional or local basis.

The *amici curiae* have requested leave to file this brief because of the potential effect that the decision of the Supreme Court of Michigan may have on the interpretation of insurance laws throughout the United States and the impact of such interpretation on the business of insurance companies. The opinion of the Supreme Court of Michigan mandates a direct application of procedural due process under the Fourteenth Amendment to the Constitution of the United States to all insurance transactions wherein the insurance purchased is made compulsory by state law.

The opinion of the Supreme Court of Michigan, if not reversed by this Court, may be readily adopted by other state supreme courts and by the Courts of Appeal. The Michigan opinion brings into direct question the constitutional validity of all compulsory insurance laws in the United States. It can also be expected that the decision will be an impediment to the passage of no-fault statutes in states which have not yet enacted such statutes. The doctrine espoused by the Supreme Court of Michigan would necessarily evolve over a long period of time on a case-by-case basis creating enormous uncertainty as to the requirements imposed upon insurance companies. The rationale of the Michigan opinion, if followed, will extend court supervised due process requirements to a competitive industry and lead to wasteful procedures the cost of which will ultimately be borne by the consuming public.

The *amici curiae* believe that the national import of the decision of the Supreme Court of the State of Michigan for the insurance industry and individual companies engaged in competitive marketing may not be adequately presented by the parties hereto and is important to the ultimate disposition of this case. The question of procedural due process under the Fourteenth Amendment to the Constitution of the United States as related

to the purchase of insurance was not presented to the Supreme Court of the State of Michigan by the parties hereto. It was raised, *sua sponte*, by four of the justices after the filing of briefs and oral argument in that Court.[1]

Question Presented.

Whether the Supreme Court of the State of Michigan correctly held that whenever a state requires a resident of that state to purchase insurance as a requirement to the registration of an automobile the private supplier of insurance is engaged in state action and the Fourteenth Amendment to the Constitution of the United States therefore mandates full procedural due process to the purchaser of said insurance?

I.

THE DECISION OF THE SUPREME COURT OF MICHIGAN IF NOT REVERSED BY THIS COURT, WILL BE REGARDED AS A PRECEDENT TO BE FOLLOWED BY THE SUPREME COURTS OF OTHER STATES AND BY THE COURTS OF APPEAL.

The Supreme Court of the State of Michigan has enunciated a novel proposition of constitutional interpretation relating to the sale of insurance heretofore neither presented to nor decided by this Court. This Court has previously recognized the need to grant certiorari under such circumstances. *Pernell* v. *Southall Realty*, 416 U. S. 363, 40 L. Ed. 2d 198, 94 S. Ct. 1723 (1974); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977).

By declaring the Michigan legislative scheme for no-fault insurance to be violative of the Fourteenth Amendment insofar as it provides for the purchase of compulsory insurance, the holding of the Supreme Court of Michigan brings into question

1. *Shavers* v. *Kelley*, 402 Mich. 554, 267 N. W. 2d 72, 106, 118, 120 (separate opinions of Ryan, Fitzgerald and Coleman, JJ.)

the constitutionality of compulsory insurance statutes in twenty-four states. Under similar circumstances this Court has previously granted the writ. *New York* v. *O'Neill*, 359 U. S. 1, 3 L. Ed. 2d 585, 79 S. Ct. 564 (1959).

In arriving at its decision, the Michigan Supreme Court relied upon its misinterpretation of this Court's opinion in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). Such misinterpretations of this Court's decisions have previously militated in favor of granting the writ. *Oregon* v. *Mathiason*, 429 U. S. 492, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965).

Furthermore, it can be reasonably predicted that the Michigan holding will provide a basis for considerable litigation in many, if not most, of the states. It may be many years before this Court again has an opportunity to review such an interpretation of the Fourteenth Amendment. This Court's review at this time may serve to prevent needless and wasteful litigation of this issue in years to come.

It is self-evident why this Court must be the final source of interpretation of the Constitution.[2] The same reasons compel this Court to be ever alert to the possibility of misinterpretation of the Constitution by state courts and the ills which might flow therefrom.

II.

THE DECISION OF THE MICHIGAN SUPREME COURT, IF NOT REVERSED, WILL SERVE AS A PRECEDENT FOR SIMILAR RULINGS IN OTHER STATES, WILL IMPEDE THE PASSAGE OF NO-FAULT STATUTES IN OTHER STATES AND WILL HAVE A NEGATIVE EFFECT ON THE MARKETING OF INSURANCE.

The opinion of the Supreme Court of Michigan calls into question the constitutional validity of all compulsory insurance

2. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 347-48, 4 L. Ed. 97, 108 (1816).

laws in the United States. To date, twenty-four states, other than Michigan, have statutes requiring compulsory automobile insurance.[3] If the full requirements of procedural due process under the Fourteenth Amendment are applied to the competitive marketing of compulsory insurance in these states, it is possible that each such statute may be found to be unconstitutional.

Another immediate effect of the decision of the Michigan Supreme Court will be to deter the passage of further no-fault laws in any additional states. Currently, twenty-three states, in addition to Michigan, have enacted no-fault laws.[4] Most no-fault automobile insurance reparation plans depend upon the requirement of compulsory insurance. If the marketing of no-fault insurance is subject to the full panoply of procedural due process, state legislatures will be understandably reluctant to enact no-fault statutes. The effect of the Michigan decision on further reform of the automobile reparation system could prove to be disasterous.

The Michigan court's interpretation of due process would also increase uncertainty in insurance marketing and regulation by casting doubt upon the constitutionality of many of the present state regulatory mechanisms.

Moreover, the imposition of constitutional requirements on insurance marketing would doubtless give rise to considerable private litigation based upon alleged violations of due process.

The *Shavers* opinion also is contrary to the present trend toward de-regulation of industries (*i.e.*, airlines, oil companies,

3. California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina and Utah. (This listing does not include the numerous states which have financial responsibility laws which may also be invalidated if the reasoning in *Shavers* is followed.)

4. Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah and Virginia.

railroads and the trucking industry) for the purpose of increasing competition. The Michigan decision would require additional and court-supervised regulation over one of the most competitive industries in this country. At the present time, automobile insurers are regulated by comprehensive insurance codes in fifty states.

A recent study by the Antitrust Division of the Department of Justice determined that rigid state rate regulation has had adverse effects on competition in the field of insurance.[5] Among the effects noted in the study are the discouragement of rate reductions, establishment of various forms of cross-subsidization between good and bad risks and the aggravation of the availability of insurance which marginal or high risks have difficulty in obtaining in the open market at the prevailing rates.[6] The study prescribes more competition which implies less regulation.

The Michigan opinion would extend additional regulation under the guise of due process. If other states were to follow this decision, there would be an inhibiting effect on the increased competition suggested by the Department of Justice and others. Such totally unnecessary constitutional safeguards will require each insurer to scrutinize all applicants critically. The natural reluctance of the carriers to write any undesirable drivers will be considerably enhanced by the decision. The carriers would be overly cautious in expanding their business in any state adopting the Michigan rationale thereby lessening competition within the industry. In addition, carriers will be deterred from experimentation with new types of coverage, which by their very nature, require carefully controlled and selective underwriting.

Direct application of due process procedural safeguards to a competitive private industry such as the insurance industry is not only unnecessary but will also be wasteful and costly. For

5. Antitrust Division, U.S. Dept. of Justice, Federal-State Regulation of the Pricing and Marketing of Insurance, American Enterprise Institute of Public Policy Research 89 (P. MacAvoy ed. 1977)

6. *Id.*

example, the Supreme Court of Michigan has held, in its "minimum" requirements for due process, that each person purchasing automobile insurance in Michigan (some 6,000,000) be accorded an administrative review of the manner in which insurance rates are applied to his individual premium charge.

Nor are the ramifications of the Michigan court's decision limited to the insurance industry. The Supreme Court of Michigan reasoned that because: (1) insurance is a prerequisite to the registration of an automobile in Michigan; and (2) the registration of an automobile is a prerequisite to the utilization of a driver's license; and (3) the right to a driver's license is constitutionally protected, that it is therefore necessary to provide due process protection for the purchaser of insurance.

If the logic of the Michigan Supreme Court is applied to other requirements for the registration and operation of a motor vehicle, numerous industries will be subject to due process supervision by the courts as to their pricing and marketing. For example, many states require that certain drivers can validly utilize their driver's license only while wearing eye-glasses. The Michigan opinion, applied to such a requirement, would mandate that the courts, under due process requirements, supervise the marketing of eye-glasses because they are a necessary prerequisite to the utilization of a driver's license. The same analogy would hold for requirements of side-view mirrors and of any other automobile equipment required by statute. Such an application of the court's reasoning to other products demonstrates on the one hand the enormous mischief that would result from its application; and on the other hand, the error of extending due process to private entities engaged in a competitive industry.

The rationale of the Supreme Court of the State of Michigan could readily be adapted by other states to the sale of any service or product required under state law and not limited to automobile insurance or to automotive products. Such an adaptation of the Michigan rationale would obviously be a fruitful source of civil litigation, probably on a class action basis, which

would seek the imposition of procedural due process upon business entities engaged in competitive industries. Such a result is neither practically necessary nor constitutionally defensible.

III.

THE SUPREME COURT OF MICHIGAN CLEARLY ERRED IN APPLYING FULL DUE PROCESS REQUIREMENTS TO EVERY COMPANY IN A PRIVATE, COMPETITIVE INDUSTRY. THE ERROR AROSE FROM THE COURT'S MISAPPLICATION OF THIS COURT'S HOLDING IN THE JACKSON CASE AND HAS EXTENDED DUE PROCESS REQUIREMENTS TO AN EXTENT NEITHER AUTHORIZED NOR CONTEMPLATED BY THIS COURT.

The Supreme Court of Michigan has interpreted the Fourteenth Amendment in a manner and to an extent never authorized by this Court. The *Shavers* opinion imposes full due process requirements upon every automobile insurance company doing business in the State of Michigan. The opinion does so even though the insurance companies are individually selling insurance in a competitive market.

The majority opinion of the Michigan court arrived at this extraordinary result by misreading and misapplying this Court's holding in the *Jackson* case.[7]

It is fundamental that the due process requirements of the Fourteenth Amendment apply only to governmental entities, or to private entities engaged in "state action".[8] This Court has never found state action by a private entity unless (1) the entity was performing an activity which was traditionally an exclusive public function;[9] or (2) the activity of the private entity was

7. *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974).

8. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972).

9. *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 56 L. Ed. 2d 185 (1978).

either compelled or encouraged to such an extent that the activity was transformed into state action;[10] or (3) the activity challenged was so connected with the action of the state that the conduct was attributable to the state for purposes of the Fourteenth Amendment.[11]

The selling of insurance by individual insurers in the State of Michigan is an activity which does not fit within any of the categories of conduct delineated by this Court.

(1) The sale of automobile insurance is not an activity which has been traditionally an exclusive function of the state and therefore cannot be considered state action.

(2) The sale of automobile insurance by individual insurers is neither compelled nor encouraged by Michigan law. Insurers are free to sell automobile insurance or not to sell automobile insurance in the state of Michigan. The Michigan court noted that insurers are free under the subject legislation to accept or reject certain risks. Thus the compulsion or encouragement by the state which could conceivably give rise to state action is totally absent.

(3) The sale of automobile insurance by a private insurer is not so connected with the state that the sale transactions "may be fairly treated as that of the state itself."[12] The opinion of the Supreme Court of Michigan presents many impediments to analysis, but the court apparently relied on this test for its state action holding and cited only the *Jackson* case in support of its holding.

The *Jackson* case not only does not support the holding of the Michigan court but stands in direct contradiction. In *Jackson* this court rejected the argument that because the challenged activity was conducted by a monopoly, the activity constituted

10. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 170-171, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

11. *Jackson, supra,* at 358-359.

12. *Jackson, supra,* at 484.

state action. Yet the Michigan court, ostensibly relying upon *Jackson*, determined that the sale of automobile insurance in a competitive market does constitute state action.

Not only did the Michigan court misapply the test in *Jackson*, but it did so without any basis for its misapplication. None of the over two hundred fifty insurance companies writing automobile insurance in Michigan enjoys the status of monopoly nor do the companies collectively constitute a monopoly since other companies are free to compete in the insurance market. The marketing of insurance by individual companies in the competitive market is so far removed from governmental action that it simply cannot be considered state action.

In summation, the Michigan court while ostensibly relying on *Jackson*, has purported to find "state action" where none exists under the teachings of this Court. The lack of foundation for such a holding was duly noted by the three dissenting Justices.[13]

In so holding, the majority opinion of the Supreme Court of Michigan has imposed upon individual insurance companies greater restrictions as a matter of federal constitutional law than this Court has, contrary to this Court's holdings.[14]

The majority opinion of the Supreme Court of Michigan, in purporting to interpret the Fourteenth Amendment, has not only totally misapplied the holdings of this Court, but has done what this Court never authorized. The Michigan opinion has imposed due process requirements on each individual insurance company selling automobile insurance in the State of Michigan. The Michigan court has imposed due process requirements, in

13. *Shavers, supra,* 267 N. W. 2d at 106, 118, 120.

14. "But, of course, a state may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them. See *Smayda* v. *United States,* 352 F. 2d 251, 253 (CA9 1965), cert. denied, 382 U. S. 981, 15 L. Ed. 2d 471, 86 S. Ct. 555 (1966); *Aftanase* v. *Economy Baler Co.,* 343 F. 2d 187, 193 (CA8 1965)." *Oregon* v. *Hass,* 420 U. S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975).

effect, upon an entire industry. It has done so despite the fact the marketing of insurance is neither a function traditionally performed by the sovereign nor an activity compelled by the state nor an activity which is so intimately connected with the activity of the state that it becomes state action.

The principle that hundreds of insurance companies operating in a competitive market and under extensive state regulation are engaged in "state action" so as to require court imposed due process requirements may be adopted by other courts, unless corrected by this Court. The spread of the novel doctrine created by the Michigan court's opinion will result in extensive litigation in state and federal courts, in a total uncertainty among insurance carriers as to the legality of their marketing practices, and in incredible, unnecessary burdens upon insurance carriers which will ultimately, of necessity, be paid for by the consuming public.

CONCLUSION.

For the above reasons, it is respectfully submitted that this Court issue a writ of certiorari to the Supreme Court of Michigan.

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